Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

EMILY DISTAJO, RENATO DISTAJO, CONSTANTINO LAMANDO, MILO LAMANDO, JOSE ALBERTO BRENES, ALVARO GUERRERO, MARIA GUERRERO, WESAM YOUMARAN, LINDA YOUMARAN, LOUIS LOENNECKE, MARY ANN BOOKOUT, MICHAEL JOHNSON, GREGORY KANE, DEBORAH KANE, BRUNO GIANNINI, RONALD ROTHMUND, PATRICIA ROTHMUND, JOHN PAPALEO, J.S.P., INC., RAYMOND BICKEL and SANDRA BICKEL.
Petitioners,

vs.

DOCTOR'S ASSOCIATES, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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12 pp

QUESTIONS PRESENTED

I. Whether a federal court may enjoin in personam proceedings in a state court which has concurrent jurisdiction over the same claim, to insure federal determination of that claim.

II. Whether the federal courts may avoid appellate scrutiny of a federal injunction of state proceedings, issued in violation of 28 U.S.C. §2283 to preserve the case for federal determination, by entering a subsequent judgment and another injunction to effectuate it, made possible by the earlier, offending injunction?

LIST OF PARTIES

In addition to the parties named in the caption of the case, Mushtag Kanchwala, Anver Kanchwala, Azinn Hemani, Julie Shino, Johnson Shino, Albert Yonan and Lelyah Yonan were also parties to the proceedings in the court whose judgment is sought to be reviewed here. They are not petitioners. There are no other parties to the proceedings in the court whose judgment is sought to be reviewed here. There is no parent or subsidiary company of any party to be listed.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Emily Distajo, Renato Distajo, Constantino Lamando, Milo Lamando, Jose Alberto Brenes, Alvaro Guerrero, Maria Guerrero, Wesam Youmaran, Linda Youmaran, Louis Loennecke, Mary Ann Bookout, Michael Johnson, Gregory Kane, Deborah Kane, Bruno Giannini, Ronald Rothmund, Patricia Rothmund, John Papaleo, J.S.P., Inc., Raymond Bickel and Sandra Bickel respectfully Petition for a writ of certiorari to review the

judgment of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The opinion of the Court of Appeals dismissing the appeal in this case as moot is unreported. It is reproduced in the appendix at page 31a. The District Court opinion is reported, Doctor's Associates, Inc. v. Distajo, et al., 944 F.Supp. 1007(d) (Conn. 1996) which is also reproduced in the appendix at pages 63a-70a. The opinion of the Court of Appeals in a case heard in tandem with this one, Second Circuit Docket No. 96-7321 is reported, Doctor's Associates, Inc. v. Distajo, et al., 107 F.3d 126 (2nd Cir. 1997). It is also reproduced in the appendix at pages 1a-30a. The District Court opinion with respect to that case is reported, Doctor's Associates, Inc. v. Distajo, et al., 944 F.Supp. 1010 (D. Conn. 1996). That case is also reproduced in the appendix at pages 71a-95a. The opinions below were issued following remand after a previous appeal. See Doctor's Associates, Inc., 870 F. Supp. 34 (D. Conn. 1994), partially affirmed and partially reversed and remanded, Doctor's Associates, Inc. v. Distajo, et al., 66 F. 3d 438 (2nd Cir. 1995), cert. denied ___ U.S. ___, 116 S.Ct. 1352, 134 L.Ed. 2d 520 (1996).

STATEMENT OF JURISDICTION

The Court of Appeals entered judgment on February 24, 1997. The petition for rehearing was denied on April 24, 1997. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

28 U.S.C. §2283

§2283. STAY OF STATE COURT PROCEEDINGS

A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by act of congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

STATEMENT OF THE CASE

All petitioners except Michael Johnson, the Kanes and Bruno Giannini, are franchisees of Doctor's Associates, Inc. ("DAI") who operated Subway Sandwich franchise stores in Illinois. With the exception of Louis Loenneke and Mary Ann Bookout, who reside in Wisconsin, the Illinois franchisees are all Illinois citizens and residents. All petitioners except Michael Johnson, the Kanes and Bruno Giannini, will hereafter be referred to as the Illinois franchisees.

Michael Johnson is a citizen and resident of North Carolina who operated a Subway Sandwich franchise store in Gastonia, North Carolina.

Gregory Kane and Deborah Kane are citizens and residents of Massachusetts who operated a Subway franchise store there and filed suit there against DAI and others claiming violations of the Massachusetts Consumer Fraud Statute, common law fraud and breach of contract, among other claims.

Bruno Giannini is a citizen and resident of Pennsylvania who operated a Subway franchise store there and filed suit against DAI and others there, claiming fraud.

In late 1993 and early 1994, most of the Illinois franchisees filed suit against DAI and others in Madison County Illinois claiming violations of the Illinois Franchise Disclosure Act, the Illinois Consumer Fraud Act, Common Law Fraud and Breach of Contract, among other claims.

The first four sets of Illinois franchisees filed their state complaints during December, 1993. On January 20, 1994, DAI removed the first four cases to the United States District Court for Southern Illinois, which remanded all four cases on March 24, 1994. Under federal common law according to the Seventh Circuit, which sits in Illinois, DAI waived its right to compel arbitration by first removing those cases to the federal district court before attempting to compel arbitration. Cabinetree of Wis., v. Kraftmaid Cabinetry, Inc., 50 F. 3d 388 (7th Cir. 1995).

Three of the other four Illinois cases were filed from March through August, 1994. From about March 31 through August, 1994 DAI filed petitions to compel arbitration against the Illinois franchisees in the first seven Illinois cases.

On March 30, 1994 DAI filed motions to stay pending arbitration in the Illinois state cases. DAI subsequently withdrew those motions. DAI then filed state court motions to dismiss or transfer, alleging lack of venue. Those motions were denied in the Illinois state court prior to July 29, 1994. DAI also filed motions in the state court to transfer to Cook County, Illinois on the grounds of forum non conveniens. Those motions were heard and denied on July 29, 1994. DAI appealed those decisions to the Illinois Court of Appeals, where they are now pending.

On October 24, 1994 the Illinois state court entered a judgment holding the arbitration clauses in

the first seven Illinois cases void and unenforceable on the grounds of waiver, unconscionability, failure to meet the reasonable expectations of the parties under Restatement of Contracts, Second, § 211 and lack of mutuality. App. 45a. Thereafter the Connecticut federal court issued contrary orders compelling the Illinois franchisees to arbitrate their claims against DAI in Connecticut and enjoining further prosecution of the state actions.

The 8th group of Illinois franchisees, the Bickels, filed their state court complaint against DAI et al. during late December, 1994 or early January, 1995. DAI obtained a "filed" copy of the complaint and attached it to a petition to compel arbitration filed in the United States District Court for Connecticut (more than 10 days before its answer was due in Illinois) where it also sought an injunction against the Bickels' state action. However, DAI failed to timely enter its appearance in the state action, and on February 7, 1995 a default judgment was entered against it in the state case on the issue of liability, scheduling a damage hearing for April 4, 1995. The court also granted a default judgment on the declaratory judgment count holding the arbitration clause void and unenforceable. App. 51a. Thereafter the Connecticut District Court enjoined further prosecution of the Bickels' state action, but permitted DAI and a fellow state defendant to file a motion there to set aside the default judgment.

DAI filed Petitions to Compel Arbitration in the Federal Court in Connecticut against the Kanes and separately against Bruni Giannini after they filed their respective State actions against DAI in Massachusetts and Pennsylvania. Unlike the State courts in Illinois and North Carolina, the Massachusetts and Pennsylvania courts did not rule on the enforceability of the arbitration clauses before

the Kanes and Bruno Giannini were subjected to the Connecticut Federal Court injunctions barring them from proceeding further with their State Court actions.

On April 8, 1993 Michael Johnson filed an action in the North Carolina state court against DAI and others claiming fraud, breach of contract and related claims. DAI entered its appearance and moved to stay that action pending arbitration and also moved to dismiss claiming that Michael Johnson failed to meet a condition precedent to litigation by failing to first arbitrate his claim against DAI in Connecticut. Those motions were briefed, argued and decided by the North Carolina state court in orders issued on May 3 and May 17, 1994, in which the state court denied DAI's motions to dismiss and to stay. The following day DAI filed a petition to compel arbitration against Michael Johnson in the federal court in Connecticut, App. 42a, and about one week later filed an appeal of the state decisions to the North Carolina Court of Appeals. App. 43a.

Thereafter the Connecticut federal court disregarded the previous state judgments in Illinois and North Carolina and entered judgment compelling all petitioners to arbitrate their claims against DAI in Connecticut, while enjoining petitioners from further prosecution of their state actions in Illinois, North Carolina, Massachusetts and Pennsylvania. The franchisees appealed.

On September 12, 1995 the Second Circuit issued an opinion partially affirming, partially reversing and remanding the cases of all petitioners to the district court. The judgment compelling arbitration and the injunctions against the state actions were reversed and the case remanded with directions to reconsider some of the issues concerning

the enforceability and validity of the arbitration clauses. Doctor's Associates, Inc. v. Distajo, et al., 66 F. 3d 438 (2nd Cir. 1995).

The Second Circuit rejected the full faith and credit argument of the Illinois franchisees, 66 F. 3d 438, 449-50, on the grounds that Ballweg v. City of Springfield, 114 Ill. 2d 107, 102 Ill. Dec. 360, 499 N.E. 2d 1373 (1986) permitted a losing party to file a second action and relitigate the same claim against the same opposing party while appealing the adverse decision in the first case. The Seventh Circuit, which sits in Illinois, has previously refused to interpret the Ballweg case and Illinois law in that fashion. Rogers v. Desiderio, 58 F. 3d 299, 301-302 (7th Cir. 1995), Prymer v. Ogden, 29 F. 3d 1208, 1213 n. 2 (7th Cir. 1994). The Second Circuit refused to apply the full faith and credit statute to the North Carolina rulings in favor of Michael Johnson on the ground that the basis for the North Carolina state orders was unclear and therefore not entitled to preclusive effect under North Carolina law. 66 F. 3d 438 at 450-51.

After remand, the Connecticut federal court issued a temporary restraining order on December 5, 1995 to prevent the state courts from proceeding while the Connecticut federal court considered the petitions to compel arbitration, followed by a preliminary injunction on January 3, 1996, App. 63a, Doctor's Associates, Inc. v. Distajo et al., 944 F. Supp. 1007, 1009 (D. Conn. 1996). The district court held that the preliminary injunction against the state actions, while the federal court considered the petitions to compel arbitration, was necessary in aid of the federal court's jurisdiction, as one of the exceptions to the anti-injunction act, 28 U.S.C. §2283, to prevent the State Courts from interfering with the Federal action. The State and Federal Courts had concurrent jurisdiction at that time.

The state courts had previously entered judgments holding the arbitration clauses void and unenforceable and DAI had appealed those judgments and orders to the Illinois Courts of Appeals. Five appeals filed by DAI to the Illinois Court of Appeals are currently stayed because of the Connecticut federal court injunctions against the state actions and another appeal by DAI to the North Carolina Court of Appeals is currently stayed for the same reason.

The January 3, 1996 Connecticut federal court injunction violated the anti-injunction act, 28 U.S.C. §2283, and the rationale of the district court directly conflicts with Chick Kam Choo v. Exxon Corp.,486 U.S. 140, 108 S. Ct. 1684, 1689, 100 L.Ed. 2d 234 (1988), Amalgamated Clothing Workers v. Richman Brothers, 348 U.S. 511, 75 S. Ct. 452, 456-57, 99 L. Ed. 600 (1955), Atlantic Coastline R.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 90 S. Ct. 1739, 26 L.Ed. 2d 234, 246 (1970) and Vendo v. Lektro-Vend Corp., 433 U.S. 523, 53 L.Ed. 2d 1009, 1023-24, 97 S. Ct. 2881 (1977), which holds:

> "No case of this court has ever held that an injunction to 'preserve' a case or controversy fits within the 'necessary in aid of its jurisdiction' exception *** ".

The Second Circuit dismissed as moot the franchisees' appeal from the January 3, 1996 preliminary injunction because the Connecticut federal court entered judgment compelling arbitration on March 14, 1996 and another injunction to effectuate the March 14, 1996 judgment. App. 31a, 76a.

The petitioners and other Subway franchisees have filed three separate petitions for writs of certiorari arising from two Second Circuit cases argued in tandem, resulting in an opinion in one and

dismissal of the appeal in this case on February 24, 1997 and a subsequent summary opinion issued on June 10, 1997 based, in large part, on the February 24, 1997 opinion. The questions presented by these three separate petitions for writs of certiorari are set forth in the appendix. App. 96a-97a.

While the three petitions for writs of certiorari arise from three cases which are somewhat related, the questions presented in each petition are separate and distinct.

The initial preliminary injunction against the Bickel state action permitted DAI et al. to litigate motions in the state court to set aside the default judgment of February 7, 1995. Those motions were briefed and argued on April 4, 1995, and were under submission to the state court when the injunction was reversed on September 12, 1995. Doctor's Associates, Inc. v. Distajo, et al. 66 F. 3d 438 (2nd Cir. 1995).

On December 6, 1995 the Illinois state court denied the motion of DAI to set aside the default judgment and entered judgment for $400,000.00 in actual damages in favor of the Bickels and against DAI. App. 54a. This was one day after the temporary restraining order issued by the Connecticut district court on December 5, 1995, App. 61a. While the Second Circuit felt it was significant that the Bickels did not notify the state court of the December 5, 1995 temporary restraining order, there was no hearing in the state court on December 6. The state court merely ruled on motions already before it. The various temporary restraining orders and injunctions issued by the Connecticut federal court were issued against the parties, not the state courts. The courts therefore were not bound by those injunctive orders. Milltex Industries Corp. v. Jacquard Lace Co. Ltd., 922 F. 2d 164, 167 (2nd Cir. 1991).

The state actions have been under injunction almost continuously since November, 1994.

On March 14, 1996 the Connecticut federal court entered judgment compelling all franchisees to arbitrate their claims against DAI in Connecticut and enjoined the state actions to effectuate that judgment. Injunctions to effectuate a federal judgment fall within one of the three narrow exceptions to the anti-injunction act, 28 U.S.C. §2283.

The franchisees appealed again. On February 24, 1997 the Second Circuit issued its opinion and judgment affirming the Connecticut district court judgment compelling arbitration and the injunction to effectuate that judgment, Docket No. 96-7321. App. 1a-30a.

The Second Circuit dismissed as moot the appeal from the prior, January 3, 1996 preliminary injunction which enjoined the state actions while the federal court determined whether to compel arbitration. App. 31a.

REASONS FOR GRANTING THE WRIT

I. The Petition should be granted to resolve the conflict between the opinion below and Vendo v. Lektro Vend Corp., 433 U.S. 523 (1977).

In December, 1994, the Connecticut federal court enjoined the petitioners from proceeding with their state actions in Massachusetts, Pennsylvania, North Carolina and Illinois, to "effectuate" the Connecticut federal court's judgment of November, 1994, compelling the franchisees to arbitrate their claims against DAI in Connecticut. The judgment compelling arbitration and the injunctions to effectuate the judgment were reversed by the Second Circuit on September 12, 1995,

Doctor's Associates, Inc. v. Distajo, et al., 66 F. 3d 438 (2nd Cir. 1995).

The eight sets of Illinois franchisees who are petitioners here had obtained Illinois state judgments on October 24, 1994 and on February 7, 1995 (for the Bickels) holding the arbitration clauses void and unenforceable because of unconscionability, failure to meet the reasonable expectations of the parties under Restatement of Contracts, Second, § 211, lack of mutuality, waiver and as against public policy. The North Carolina court (Michael Johnson) had denied the motions of DAI to dismiss or to stay that state action on the basis of the arbitration clause. The state courts in Massachusetts (the Kanes) and Pennsylvania (Bruno Giannini) had not yet ruled on the issue.

By December, 1995, all petitioners were prepared to proceed with their state actions which were no longer subject to the Connecticut federal injunction which had been reversed.

In early December, 1995 the Connecticut federal court could not enjoin the state actions to "effectuate" a Connecticut federal judgment, because no federal Connecticut judgment existed. At that time both the state courts and the Connecticut federal court had concurrent jurisdiction of the claims between the franchisees and DAI concerning the validity and enforceability of the arbitration agreements. All actions were based upon in personam jurisdiction.

Under these circumstances neither court was free to enjoin the parties from proceeding in the other court with concurrent jurisdiction. Atlantic Coastline R.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed. 2d 234, at 246 (1970):

> "In short, the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts."

The three exceptions to the Anti-Injunction Act, 28 U.S.C. §2283, are narrow and are not to be enlarged by statutory construction. Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 108 S.Ct. 1684, 1689, 100 L.Ed. 2d 234 (1988). See also Amalgamated Clothing Workers v. Richman Brothers, 348 U.S. 511, 75 S.Ct. 452, 456-57, 99 L.Ed. 600 (1955):

> "The prohibition of §2283 is but continuing evidence of confidence in the state courts, reinforced by a desire to avoid direct conflicts between state and federal courts."

Despite the Supreme Court decisions construing the Anti-Injunction Act in this fashion, in December, 1995 the Connecticut federal court proceeded to issue a temporary restraining order against further proceedings in the state courts, although the Connecticut federal court had no judgment to protect, followed by a January 3, 1996 preliminary injunction against further proceedings in the state courts. Doctor's Associates, Inc. v. Distajo, et al., 944 F. Supp. 1007, 1009 [2] (D. Conn. 1996), App. 65a-67a. The Connecticut federal court determined that the preliminary injunction against the state court proceedings was necessary to prevent the "state court's from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." App. 68a.

At the time most of the state courts had already determined that the arbitration clauses were void and unenforceable. Five appeals by DAI were pending in

the Illinois Court of Appeals and one appeal by DAI was pending in the North Carolina Court of Appeals. A State court judgment for $400,000.00 had been entered in favor of the Bickels and against DAI. DAI had posted an appeal bond and appealed to the Illinois Court of Appeals. That appeal is still pending although it is currently stayed as a result of the subsequent Connecticut Federal Court injunction.

The decision of the Connecticut federal court to enjoin the state court actions, through a temporary restraining order on December 5, 1995, and a preliminary injunction on January 3, 1996, although there was no federal judgment to protect, is diametrically opposed to the rule of Vendo v. Lektro-Vend Corp., 433 U.S. 523, 53 L.Ed. 2d 1009, 1023-24, 97 S.Ct. 2881 (1977), which holds:

> "The traditional notion is that in personam actions in federal and state court may proceed concurrently, without interference from either court, and that there is no evidence that the exception to §2283 was intended to alter this balance. We have never viewed parallel in personam actions as interfering with the jurisdiction of either court;
>
> . . . Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of res judicata. . .
>
> No case of this court has ever held that an injunction to 'preserve' a case or controversy fits within the 'necessary in aid of its jurisdiction' exception.

***

> Our conclusion that neither of the bases relied upon by the District Court constitutes an exception to §2283 is more than consistent with the recognition that any doubt must be resolved against the finding of an exception to §2283 ***" (Emphasis original).

While proceedings in the state courts were enjoined, the Connecticut federal court proceeded to determine that the arbitration clauses were valid and enforceable and entered a judgment compelling arbitration on March 14, 1996 and another injunction to effectuate that judgment. App. 71a, 76a.

The franchisees appealed the judgment and injunction of March 14, 1996, resulting in the February 24, 1997 Second Circuit opinion, Doctor's Associates, Inc. v. Distajo, et al., 107 F. 3d 126 (2nd Cir. 1997). App. 1a-30a. The franchisees also appealed the January 3, 1996 injunction, which was clearly issued in violation of 28 U.S.C. §2283. That appeal was heard in tandem with the appeal from the March 14, 1996 judgment and injunction.

DAI filed a motion to dismiss the appeal from the January 3, 1996 preliminary injunction on the ground that it was moot because the Connecticut federal court had issued a subsequent judgment and injunction to effectuate that judgment on March 14, 1996.

Without comment, the Second Circuit granted the motion to dismiss on February 24, 1997. App. 31a.

The March 14, 1996 judgment compelling arbitration and the preliminary injunction to effectuate that judgment were made possible by the illegal injunction of January 3, 1996 and before it the illegal temporary restraining order of December 5,

1995, extended by 10 more days on December 19, 1995.

One of the Illinois cases in which a judgment holding the arbitration clause void and unenforceable had previously been entered, involving the Guerreros, was scheduled for jury trial in the Illinois state court on December 11, 1995. That case did not proceed to trial on the merits only because of the Connecticut federal temporary restraining order of December 5, 1995, extended another ten days on December 19, 1995 and the preliminary injunction of January 3, 1996.

Since the Second Circuit dismissed the appeal from the January 3, 1996 preliminary injunction as moot, in an unreported decision, the final reported decision with respect to that injunction is Doctor's Associates, Inc. v. Distajo, et al., 944 F. Supp. 1007, 1009 (D. Conn. 1996) which permits federal courts, with concurrent jurisdiction over the same claims as state courts, to enjoin the state court proceeding to preserve the claim for federal determination. That decision is diametrically opposed to this court's decisions in Vendo v. Lektro-Vend Corp., Atlantic Coastline R. R. Co. v. Brotherhood of Locomotive Engineers, Amalgamated Clothing Workers v. Richman Brothers, and Chick Kam Choo v. Exxon Corp.

The Petition should be granted to resolve this conflict.

II. The Petition should be granted to confirm that federal courts may not preserve claims for federal determination where state and federal actions with concurrent jurisdiction are proceeding simultaneously, in violation of 28 U.S.C. § 2283, and then avoid appellate scrutiny of such illegal injunctions by issuing a subsequent judgment (while the state action is enjoined) and another injunction to effectuate that federal judgment, because of the national importance of this issue and the effect of the opinion below on the principles of Federalism.

The December 5, 1995 temporary restraining order, December 19, 1995 ten day extension of the temporary restraining order and the January 3, 1996 preliminary injunction were all issued in violation of the Anti-Injunction Act, 28 U.S.C. §2283.

The Second Circuit permitted the Connecticut district court to avoid appellate scrutiny of the illegal preliminary injunction by entering a subsequent judgment, made possible by the illegal preliminary injunction, and a subsequent preliminary injunction to "effectuate" that judgment. The Second Circuit did not discuss the illegal nature of the January 3, 1996 preliminary injunction in the case heard in tandem, Doctor's Associates, Inc. v. Distajo, et al., 107 F. 3d 126 (2nd Cir. 1997), App. 1a-30a, or in the order dismissing the appeal from the January 3, 1996 preliminary injunction as moot. App. 31a.

The Second Circuit denied the franchisees' petition for rehearing on April 24, 1997. App. 32a.

In this fashion the Connecticut district court and the Second Circuit have sanctioned the use of a clearly illegal injunction and avoided appellate scrutiny of that illegal injunction by a subsequent judgment and another injunction to effectuate that judgment, both made possible by the earlier illegal injunction. The apparent ability to avoid the Anti-Injunction Act, 28 U.S.C. §2283 in this fashion raises issues of national importance concerning important principles of Federalism. The petition for certiorari should be granted for that reason.

The Federal Arbitration Act, 9 U.S.C. §1 et seq. does not pre-empt the principles of Federalism.

Doctor's Associates, Inc. currently has about 4,000 franchisees with about 12,000 Subway franchise stores throughout the United States. When franchisees file state actions in their home states against DAI, it frequently responds with a petition to compel arbitration in the Connecticut federal court. Thus the issues presented for review to the Second Circuit, and in this petition, are "capable of repetition while evading appellate review", and therefore not moot. Doe v. Gallinot, 657 F. 2d 1017, 1021 [1] n. 6 (9th Cir. 1981).

The underlying controversy between the franchisees and DAI retains vitality in that it is the subject of the ordered arbitrations as well as numerous state actions still pending in the state courts of Massachusetts, North Carolina, Pennsylvania and Illinois, five appeals pending in the Illinois Court of Appeals and one appeal pending in North Carolina, as well as three petitions for writs of certiorari. Accordingly the replacement of the January 3, 1996 injunction with the March 14, 1996 injunction made possible by the earlier, illegal, injunction does not render the January 3, 1996

preliminary injunction moot for purposes of appellate review. Whelan v. Colgan, 602 F. 2d 1060, 1061 [1] (2nd Cir. 1979), Headberg v. State Farm Mutual Auto Ins. Co., 350 F. 2d 924, 933 [19] (8th Cir. 1965).

An appeal from an injunction does not become moot where the enjoined activity has ceased if the enjoined party wishes to pursue a claim for damages arising out of the illegal injunction. Washington Steel Corp. v. TW Corp., 602 F. 2d 594, 598 [1] (3rd Cir. 1979).

The franchisees wish to pursue claims for damages against DAI because of the illegal January 3, 1996 injunction. That injunction (as well as all other injunctions against the state actions issued by the Connecticut federal court) was issued without bond. In moving to dismiss the appeal as moot, DAI argued that the franchisees were not entitled to pursue a claim for damages as a result of the illegal injunction because of the "no bond, no damages" rule. The illegal injunction was issued without bond at the request of DAI. However, the fact that the "no bond, no damages" rule precludes the franchisees from filing an action for wrongful injunction does not preclude them from filing tort actions arising from the issuance of the illegal preliminary injunction. Buddy Systems, Inc. v. Exer-Genie, Inc., 545 F. 2d 1164, 1168 [3-6] (9th Cir. 1976), cert denied 431 U.S. 903 (1977), Northern Oil Co. v Socony Mobile Oil Co., 347 F. 2d 81, 83 (2nd Cir. 1965), Tankers Corp. v. National Maritime Union, 553 F. 2d 793 (2nd Cir. 1977).

The decisions below by both the Connecticut district court and the Second Circuit Court of Appeals have dramatically affected important principles of federalism by permitting illegal injunctions while avoiding appellate scrutiny. These actions are likely

to reoccur in future cases. For these reasons the petition should be granted.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 302—August Term 1996

Argued: November 4, 1996 Decided: February 24, 1997

Docket No. 96-7321

DOCTOR'S ASSOCIATES, INC.,

Plaintiff-Appellee,

—against—

EMILY DISTAJO, et al.,

Defendants-Appellants.

Before:

FEINBERG, LEVAL and PARKER,

Circuit Judges.

Appeal from orders entered in the United States District Court for the District of Connecticut, Peter C. Dorsey, Chief Judge, granting petitions by plaintiff Doctor's Associates, Inc. (DAI) to compel arbitration of state-court claims brought by defendants Subway fran-

chisees and enjoining defendants from further prosecuting their state suits. The Second Circuit, Feinberg, J., held that: (1) the district court did not err in denying defendants' motion for a jury trial under 9 U.S.C. § 4; (2) DAI did not waive its right to arbitrate by bringing eviction actions against defendants; (3) DAI did not fraudulently induce the arbitration agreement; (4) the arbitration agreement is not unconscionable; (5) the district court did not abuse its discretion by entering two preliminary injunctions without requiring DAI to post bonds; (6) the district court had personal jurisdiction over the Kanchwala defendants; (7) the *Rooker-Feldman* doctrine did not bar jurisdiction over DAI's petitions to compel arbitration; and (8) the district court did not abuse its discretion in refusing to abstain from exercising jurisdiction over the Bickels. Affirmed.

DAVID M. DUREE, St. Louis, MO (Reinert & Duree, P.C.; Nicholas Wocl, Stamford, CT, Tooher, Puzzuoli & Wocl, Co-Counsel), *for Defendants-Appellants*.

EDWARD WOOD DUNHAM, New Haven, CT (Wiggin & Dana, Mark R. Kravitz, of Counsel), *for Plaintiff-Appellee*.

FEINBERG, Circuit Judge:

Plaintiff-appellee Doctor's Associates, Inc. (DAI), a Florida corporation, is the national franchisor of "Subway" sandwich shops. Defendants-appellants, present and former Subway franchisees, appeal from orders of

the United States District Court for the District of Connecticut, Peter C. Dorsey, Chief Judge, dated February 14, 1996, and March 14, 1996, both published at 944 F. Supp. 1010 (D.Conn. 1996), granting petitions by DAI to compel arbitration of claims the franchisees filed against DAI in various state courts. (The term "the franchisees" is used in this opinion to designate those Subway franchisees who brought state court actions against DAI and were named below as respondents in DAI's petitions to compel arbitration.) For reasons set forth below, we affirm. In a related appeal, No. 96-7011, defendants also challenge the district court's preliminary injunction dated January 3, 1996, enjoining them from prosecuting their state suits against DAI. By separate order filed today, we dismiss that appeal as moot.

We are not the first panel of this court to encounter an appeal by groups of Subway franchisees, represented by attorney David M. Duree, involving similar—if not identical—facts and legal issues regarding arbitration of disputes with DAI. We have already remanded once in this case, Doctor's Associates, Inc. v. Distajo, 66 F.3d 438 (2d Cir. 1995), cert. denied, 116 S. Ct. 1352 (1996) (*Distajo I*), and two other panels have since affirmed orders granting DAI's petitions to compel arbitration of claims by other Subway franchisees. Doctor's Associates, Inc. v. Stuart, 85 F.3d 975 (2d Cir. 1996); Doctor's Associates, Inc. v. Jabush, 89 F.3d 109 (2d Cir. 1996). At least one other appeal is pending in this court from a decision compelling franchisees to arbitrate disputes with DAI. Doctor's Associates, Inc. v. Riggs, No. 96-9141 (argument not yet scheduled). The parties have also waged battles in various other courts across the country. See Distajo I, 66 F.3d at 441 n.1 (listing other DAI/franchisee litigation). After the franchisees submitted their

initial brief in this appeal, we issued our opinion in *Stuart*, which, as discussed below, controls some of the legal issues raised in this appeal. Our decision today resolves several other legal issues in this bitter litigation.

I. Facts and Prior Proceedings

When purchasing franchises from DAI, each franchisee-defendant[1] executed a standard franchise agreement which requires the parties to arbitrate claims arising under the agreement.[2] Most of the franchise agreements state that they are governed by Connecticut law. Each franchisee-defendant also entered into a standard sublease with a leasing company affiliated with DAI. The sublease, which does not contain an arbitration clause, includes a "cross-default" provision, which allows the leasing company to evict a franchisee

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[1] This appeal involves numerous individual cases, each brought by the franchisees from a particular Subway store: Doctor's Associates, Inc. v. Distajo, No. 3:94-CV-349; Doctor's Associates, Inc. v. Brenes, No. 3:94-CV-511; Doctor's Associates, Inc. v. Guerrero, No. 3:94-CV-514; Doctor's Associates, Inc. v. Youmaran, No. 3:94-CV-515; Doctor's Associates, Inc. v. Shino, No. 3:94-CV-516; Doctor's Associates, Inc. v. Loennecke, No. 3:94-CV-517; Doctor's Associates, Inc. v. Johnson, No. 3:94-CV-803; Doctor's Associates, Inc. v. Kane, No. 3:94-CV-948; Doctor's Associates, Inc. v. Gianinni, No. 3:94-CV-1108; Doctor's Associates, Inc. v. Rothmund, No. 3:94-CV-1456; Doctor's Associates, Inc. v. Papaleo, No. 3:94-CV-1457; Doctor's Associates, Inc. v. Bickel, No. 95-CV-120; Doctor's Associates, Inc. v. Kanchwala, No. 95-CV-1915.

[2] The clause provides, in relevant part, that:

> [a]ny controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by Arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut, and judgment upon an award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof. The commencement of arbitration proceedings by an aggrieved party to settle disputes arising out of or relating to this contract is a condition precedent to the commencement of legal action by either party. . . .

for violations of either the sublease *or* the franchise agreement.[3]

Between 1991 and 1993, many disputes arose between DAI and the franchisees regarding rents, royalties and advertising fees due under the franchise agreements and subleases. To recover these monies, DAI instructed its leasing companies to file eviction actions, primarily in Illinois state court, against certain franchisees. In addition, all franchisees except the Kanes and Bickels claim that DAI routinely threatened to bring such eviction proceedings to recover alleged unpaid fees and rents.

Several months to one year after the close of these eviction proceedings, each franchisee filed a nearly identical action against DAI in state court in either Illinois, Pennsylvania, Massachusetts or North Carolina. Each suit alleged, among other things, (1) fraud with respect to DAI's policies of operating through assetless leasing companies, avoiding arbitration through use of eviction proceedings, and withholding business information from franchisees, (2) breach of contract for DAI's failure to arbitrate the disputes underlying the eviction actions, and for various unrelated violations of the franchise agreements, and (3) violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, the Illinois Franchise Disclosure Act and the Lanham Act. Each franchisee requested compensation and substantial punitive damages.

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3 The sublease provides, in relevant part, that:

> If at any time during the term of this Sublease, Sublessee shall default in the performance of any of the terms, covenants or conditions of the aforesaid Franchise Agreement . . . Sublessor, at its option, may terminate this lease . . . and upon such termination, Sublessee shall quit and surrender the leased premises to the Sublessor, but Sublessee shall remain liable for the balance of the rent due as provided in this Sublease.

Upon notice of each case filed by a franchisee, DAI immediately filed a written demand for arbitration with the American Arbitration Association in accordance with that body's Commercial Arbitration Rules (AAA Rules). When defendants refused to arbitrate their disputes, DAI filed the present petitions to compel arbitration pursuant to the Federal Arbitration Act (FAA), 9 U.S.C. § 4. The franchisees conceded that their claims in state court raise arbitrable issues under the arbitration clause in the franchise agreements. However, they argued, among other things, that DAI fraudulently induced the arbitration clause and that DAI waived its right to arbitrate by filing or threatening to file the prior eviction actions.

In November 1994, the district court granted most of DAI's petitions to compel arbitration.[4] It rejected the franchisees' arguments that the arbitration agreement was void for lack of mutuality or as a contract of adhesion, that the agreement was unconscionable, and that DAI had waived its right to arbitrate. The court also held that the franchisees' defense of fraudulent inducement should be decided by the arbitrator. By order dated December 9, 1994, the court enjoined the franchisees from prosecuting their state court actions, in order to effectuate the judgment compelling arbitration, see 28 U.S.C. § 2283.

The franchisees appealed both orders to this court. In September 1995, we issued an opinion (Distajo I) affirming and reversing in part. We upheld the district court's rulings (1) that it had subject matter (diversity) jurisdiction, (2) that judgments the franchisees had obtained against DAI in their Illinois and North Carolina state

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[4] The district court granted DAI's petitions to compel arbitration of claims brought by the Bickels and Kanchwalas in February 1995 and March 1996, respectively.

suits were not entitled to preclusive effect, and (3) that the arbitration clause was not void for lack of mutuality. On the other hand, we vacated the district court's ruling rejecting the franchisees' waiver defense to arbitration and instructed that on remand the district court should determine whether (1) "the leasing companies were mere alter egos of DAI," (2) "prosecution of those eviction actions constituted litigation of 'substantial issues going to the merits,' " and (3) "the franchisees suffered prejudice from the eviction proceedings." We also held that on remand, the district court—rather than the arbitrator—should determine whether DAI fraudulently induced the arbitration clause. Finally, we vacated the preliminary injunctions.

After the district court conducted further proceedings on remand, it filed opinions on February 14 and March 14, 1996, again granting DAI's petitions to compel arbitration. The court held that (1) the franchisees had not submitted sufficient evidentiary facts to entitle them to a jury trial on their defenses to arbitration, 944 F. Supp. at 1013-14, 1015-16, (2) DAI had not waived its right to arbitrate by bringing or threatening to bring eviction proceedings, id. at 1018-22, (3) DAI had not fraudulently induced the arbitration clause, id. at 1017-18, and (4) there was no reason for the district court to abstain based on the franchisees' state court litigation, id. at 1022-23. The franchisees challenge all of these rulings, and raise the additional arguments that (1) issues of fact remain with respect to their defenses that the arbitration clause is unconscionable and fails to meet their reasonable expectations, (2) the district court erred by entering preliminary injunctions on January 3 and March 14, 1996, without requiring DAI to post bonds, (3) the district court lacked subject matter jurisdiction to compel

arbitration, and (4) the district court lacked personal jurisdiction over the Kanchwalas.

II. Demand for a Jury Trial

The franchisees argue that the district court erred in denying them a jury trial under 9 U.S.C. § 4 on their defenses of fraud, waiver, unconscionability and failure of the contract to meet their reasonable expectations. In February 1996, the district court granted DAI's motion to forgo trial and decide these issues as a matter of law, finding that the franchisees had not shown that material facts were in dispute with respect to their defenses of fraud and waiver.[5] 944 F. Supp. at 1013-15. The franchisees then filed additional affidavits purportedly substantiating these defenses, and moved for reconsideration. In March, the district court denied that motion, observing that the franchisees had waited five to 23 months from the time DAI filed its petitions to submit such affidavits. Id. at 1016. Nevertheless, the court agreed to consider the facts alleged in their "belated" affidavits in ruling on their defenses as a matter of law. Id.

Although a party may demand a jury trial when issues respecting arbitrability are "in issue," 9 U.S.C. § 4, we have cautioned that "[a] party resisting arbitration . . . 'bears the burden of showing that he is entitled to a jury trial.' " Stuart, 85 F.3d at 983 (citing Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 961 F.2d 1148, 1154 (5th Cir. 1992)). As when opposing a motion for summary judgment under Fed.R.Civ.P. 56, the party requesting a jury trial must "submit evidentiary facts showing

[5] As discussed in Part V below, defendants did not submit the issues of unconscionability and failure of the contract to meet their expectations to the district court at that time.

that there is a dispute of fact to be tried." Oppenheimer & Co., Inc. v. Neidhardt, 56 F.3d 352, 358 (2d Cir. 1995); Stuart, 85 F.3d at 983-84 (party must demonstrate a "genuine" issue); see Manning v. Energy Conversion Devices, Inc., 833 F.2d 1096, 1103 (2d Cir. 1987).

Even after conducting discovery on their defenses, the franchisees have failed to satisfy this burden. The district court diligently complied with our direction in *Distajo I* that it "consider[ ]" the franchisees' jury demands. 66 F.3d at 456 n.13. As discussed separately below, the franchisees have not shown, even in their most recent affidavits, that material facts are in dispute regarding their fraud and waiver defenses. Moreover, by submitting the bulk of their affidavits at the last minute, the franchisees utterly failed to "alert [the] district court[ ] promptly and fully" to the facts underlying these claims. Manning, 833 F.2d at 1103. We thus affirm the district court's decision to proceed without a jury trial and rule on the defenses as a matter of law.

III. Waiver of the Right to Compel Arbitration

All the franchisees except the Bickels and Kanes argue that DAI waived its right to compel arbitration of their state-court claims based on DAI's conduct in connection with prior litigation proceedings. Specifically, DAI obtained judgments of eviction against certain franchisees.[6] 944 F. Supp. at 1019-20. Brenes, the Rothmunds and the Kanchwalas all lost their franchises as a result of these eviction proceedings. Eviction actions against another group of franchisees[7] were dismissed at

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[6] Jose Brenes, Wesam and Linda Youmaran, Ronald and Patricia Rothmund, and Michael and Anver Kanchwala and Azim Hemani.

[7] Emily and Renato Distajo and Constantine and Milo Lamando, Alvaro and Maria Guerrero, Bruno Giannini, and John Papaleo. DAI dis-

an early stage because, under state law, DAI's unregistered leasing companies could not file lawsuits in the relevant states. Id. DAI has never filed eviction proceedings against a third group of franchisees.[8] Id. at 1019. However, the franchisee-defendants (except the Kanes and Bickels) allege that DAI routinely threatened them with eviction in order to resolve its claims under the franchise agreements and subleases. The district court found that there were no material issues of fact in dispute, and held that as matter of law DAI did not waive its right to compel arbitration of franchisees' claims. 944 F. Supp. at 1020-22. We agree.

We review de novo the issue whether a party waived its right to compel arbitration. Stuart, 85 F.3d at 981 (citing Leadertex, Inc. v. Morgantown Dyeing & Finishing Corp., 67 F.3d 20, 25 (2d Cir. 1995)). "The factual determinations upon which to base the waiver determination, however, will not be reversed unless clearly erroneous." Stuart, 85 F.3d at 981. Because of the strong federal policy favoring arbitration, courts resolve doubts as to whether waiver occurred in favor of arbitration. Id. (citing Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)). In *Stuart*, we cautioned that "[t]he waiver determination must be based on the circumstances and context of the particular case, 'with a healthy regard for the policy of promoting arbitration.' " Stuart, 85 F.3d at 981 (quoting Leadertex, 67 F.3d at 25)).

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missed the action against Papaleo, who abandoned his store and ceased operation as a Subway franchisee for financial reasons while the eviction action was pending.

[8] Julie and Johnson Shino and Albert and Laylan Yonan, Louis Loenneke and Mary Ann Bookout, Michael Johnson, Gregory and Deborah Kane, and Raymond and Sandra Bickel.

On appeal, the franchisees make an elaborate argument that either Illinois or Connecticut law should apply, or at least "have some significance," on the waiver issue. However, they apparently waived this choice-of-law argument by not raising it in the district court. In any event, the Supreme Court has held that the FAA creates a "body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." Moses Cone, 460 U.S. at 24; National Union Fire Co. of Pittsburgh v. Belco Petroleum Corp., 88 F.3d 129, 133 (2d Cir. 1996); see Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lecopulos, 553 F.2d 842, 845 n.4 (2d Cir. 1977) (applying federal law to waiver issue). The franchisees do not contest that the FAA applies to this dispute, nor could they because the franchise agreements between DAI, a Florida corporation, and franchisees from various other states "evidence[ ] a transaction involving commerce." 9 U.S.C. §§ 1, 2; Allied-Bruce Terminex Comps. v. Dobson, 115 S. Ct. 834, 840-41 (1995) (§ 2's "involving commerce" standard reaches to limits of Commerce Clause power). As we recently explained, even the inclusion in the contract of a general choice-of-law clause does not require application of state law to arbitrability issues, unless it is clear that the parties intended state arbitration law to apply on a particular issue. See Belco, 88 F.3d at 134-35 (citing Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212, 1217-19 (1995)).

We have often stated the general rule that waiver of the right to arbitrate occurs when a party "engages in protracted litigation that results in prejudice to the opposing party." Cotton v. Slone, 4 F.3d 176, 179 (2d Cir. 1993) (citing Kramer v. Hammond, 943 F.2d 176, 179 (2d Cir. 1991)); Sweater Bee By Banff, Ltd. v.

Manhattan Indus., 754 F.2d 457, 461 (2d Cir. 1985) ("[L]itigation of substantial issues going to the merits may constitute a waiver of arbitration."). The "prejudice" that supports a finding of waiver can be "substantive" prejudice to the legal position of the party opposing arbitration, such as when the party seeking arbitration "loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration," Kramer, 943 F.2d at 179, or obtains information through discovery procedures not available in arbitration, Cotton, 4 F.3d at 179. Additionally, we have held that a party may be prejudiced by the "unnecessary delay or expense" that results when an opponent delays invocation of its contractual right to arbitrate. Id. (citing Kramer, 943 F.2d at 179).

Initially, we must determine the effect of our opinion in *Distajo I* on resolution of the franchisees' waiver arguments. DAI argues on appeal that, in the eviction proceedings, it did not litigate "substantial issues going to the merits" of the franchisees' current claims. The franchisees vigorously contend that the doctrine of "law of the case" prevents our reaching this argument because we stated in *Distajo I* that

> [i]f the alleged violations of the subleases were premised on violations of the franchise agreement (which DAI was contractually bound to resolve through arbitration) then DAI did litigate substantial issues going to the merits, and the only remaining question will be whether the franchisees suffered prejudice from the eviction proceedings.[9]

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[9] Except with respect to the Kanchwalas, both parties agree that the eviction actions were premised, at least in part, on violations of the franchise agreements. We also held in *Distajo I* that waiver could only apply if "DAI was responsible for the eviction proceedings" brought by its

Distajo I, 66 F.3d at 457. The district court rejected the franchisees' waiver defense solely on the ground that they had not proven sufficient prejudice. 944 F. Supp. at 1019-21.

We do not believe we are so constrained. The doctrine of "law of the case" instructs that " 'if a court decides a rule of law, that decision should continue to govern in subsequent stages of the same case.' " Sagendorf-Teal v. County of Rensselaer, 100 F.3d 270, 277 (2d Cir. 1996) (citing DiLaura v. Power Authority of State of New York, 982 F.2d 73, 76 (2d Cir. 1992)). However, the doctrine "is, at best, a discretionary doctrine, which does not constitute a limitation on the court's power but merely expresses the general practice of refusing to reopen what has been decided." United States v. Martinez, 987 F.2d 920, 923 (2d Cir. 1993) (citations and internal quotations omitted). For instance, a court may properly reconsider a prior statement of law when new evidence indicates that its prior view was unsound. See Sagendorf-Teal, 100 F.3d at 277.

In *Distajo I*, responding to two issues raised by the district court's November 1994 order compelling arbitration, we focused on (1) the relationship between DAI and the leasing companies that filed the eviction proceedings, and (2) whether the court or the arbitrator should rule on defendants' waiver defense. After a thorough discussion of the latter issue, we held that the district court should decide whether DAI had waived arbitration. 66 F.3d at 453-56. We apparently assumed that the franchisees brought their state suits in direct response to DAI's eviction actions, and that their state suits and the eviction actions raised identical issues.

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leasing companies. 66 F.3d at 457. DAI has since stipulated to responsibility for such actions.

However, DAI argues—without contradiction from the franchisees—that neither the parties nor the court focused in that appeal on the similarity (or lack thereof) of the issues raised in DAI's eviction actions and the franchisees' state suits. This factor is, of course, significant in considering whether DAI litigated "substantial issues going to the merits" of the claims it now seeks to arbitrate. In view of our clearer understanding now, after remand, of the nature and scope of prior litigation by DAI, it would serve no justifiable purpose to adhere blindly to a statement in *Distajo I* that was based on an incomplete picture of the relevant facts.[10] Cf. Cotton, 4 F.3d at 179 (waiver "necessarily depends upon the facts of the particular case"). We thus feel compelled to explore more fully whether DAI engaged in the type of prior litigation which results in waiver of its right to arbitrate.

First, we can easily dispose of the argument that DAI waived its right to arbitrate claims brought by franchisees against whom DAI never instituted eviction proceedings. In *Stuart*, we held that DAI "obviously" had not waived its right to arbitrate claims brought by franchisees against whom DAI had never instituted " 'particular eviction proceedings.' " Stuart, 85 F.3d at 982. The franchisees nevertheless insist that waiver occurred when, unlike in *Stuart*, DAI *threatened* certain franchisees with eviction, allegedly to "extort" payments from them. However, mere threats of litigation do not even constitute "litigation," and thus certainly cannot be considered "substantial litigation on the merits" for waiver analysis. Cf. Lawrence v. Comprehensive Bus. Servs. Co., 833 F.2d 1159, 1165 (5th Cir. 1987) (state-

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[10] We note that this panel includes a member of the panel in *Distajo I*.

ment suggesting party would not arbitrate did not "constitute *action* inconsistent with arbitration").

The remaining franchisees' waiver defenses also fail. We first note that the district court found that DAI's eviction actions against certain franchisees (listed above) were dismissed at an early stage, before any adjudication of the merits occurred.[11] 944 F. Supp. at 1019-20. DAI's participation in these suits did not constitute "protracted" litigation, which could result in a waiver of its right to arbitrate. Compare Leadertex, 67 F.3d at 26 (waiver when defendant engaged in "energetic pursuit of discovery" for seven months and requested arbitration "at the eleventh hour" before trial), and Cotton, 4 F.3d at 179-80 (waiver when defendant "actively litigated" dispute by taking depositions and making substantive motions), with Lecopulos, 553 F.2d at 845 (filing an action does not waive arbitration, at least until opponent "has answered on the merits").

In any event, we hold that DAI did not waive its right to arbitrate because in none of the eviction proceedings—even those four actions in which DAI won judgments of eviction—did DAI engage in litigation on the merits of the issues now raised in the franchisees' state suits. DAI persuasively argues that

> [t]here is no conceivable policy justification for a rule that, by exercising the reasonable business judgment to sue to evict someone from leased premises or to collect a debt of less than $10,000, a

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[11] The district court found that in the eviction action against the Kanchwala defendants, DAI claimed only unpaid rent due under the sublease, a non-arbitrable issue. 944 F. Supp. at 1020. The district court correctly held that litigation of non-arbitrable claims does not waive a party's right to arbitrate other, arbitrable claims. Sweater Bee, 754 F.2d at 463; Seguros Banvenez, S.A. v. S/S Oliver Drescher, 761 F.2d 855, 862 (2d Cir. 1985).

> party waives for all time its right to arbitrate every other dispute imaginable, including multimillion dollar punitive damage claims of which the party has no knowledge when it files the eviction action.

Moreover, our prior decisions do not compel a finding of waiver here. If anything, they support the view that only prior litigation of the same legal and factual issues as those the party now wants to arbitrate results in waiver of the right to arbitrate. In Gilmore v. Shearson/Am. Express, Inc., 811 F.2d 108 (2d Cir. 1987), we clearly suggested that defendant Shearson's explicit waiver of its right to arbitrate certain claims would not necessarily waive arbitration of other claims raised in an amended complaint filed after Shearson agreed to this waiver. Id. at 113. We held that because the amended complaint did not "alter the scope or theory" of the claims as to which Shearson had already waived arbitration, Shearson could not renounce its waiver and compel arbitration. Id. at 114; cf. Kramer, 943 F.2d at 178 (waiver based in part on party's prior litigation in an "identical" suit); Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 122 (2d Cir. 1991) (no waiver when prior litigation was brought by a separate party and involved "legally distinct claims").

Other circuits seem to agree that waiver can only occur when a party has previously litigated the same claims it now seeks to arbitrate. The Seventh Circuit has held that a franchisor who brought an unlawful detainer action against its franchisee had not waived its right to arbitrate other claims brought by the franchisee—including breach of contract, failure to pay royalties and advertising fees, and several Lanham Act claims—because the two suits "involved different issues." Gingiss Int'l, Inc. v. Bormet, 58 F.3d 328, 330-332 (7th Cir. 1995); but see

Midwest Window Sys., Inc. v. Amcor Indus., Inc. 630 F.2d 535, 537 (7th Cir. 1980). Similarly, in *Lawrence*, Judge Alvin B. Rubin held that a franchisor, who had previously secured a judgment against a franchisee to recover $5,000 for services provided, had not waived its right to arbitrate subsequent claims by the franchisee that the franchise agreement was illegal and unenforceable. Lawrence, 833 F.2d at 1164-65 (earlier action had not "prejudiced their present claim"). Finding waiver where a party has previously litigated an unrelated yet arbitrable dispute would effectively abrogate an arbitration clause once a party had litigated *any* issue relating to the underlying contract containing the arbitration clause.

The franchisees apparently argue that even under this rule we should find waiver because their current suits and the eviction actions "aris[e] out of the same core facts, i.e., the franchise agreement and franchise relationship." We disagree. According to DAI, the eviction actions were simple collection proceedings to recover relatively small amounts of unpaid fees and rents under the franchise agreements and subleases. The only issues involved in these disputes pertained to whether (and how much) the franchisees owed DAI. In contrast, the franchisees' state suits, filed several months to one year after the evictions, allege various violations by DAI of the franchise agreement and attack the validity of the franchise agreement and arbitration clause on a host of different federal and state law grounds. Significantly, the franchisees did not raise these claims as counterclaims in the eviction actions, nor do they now dispute that they owed the fees and/or rents which DAI sought to collect by filing eviction actions. Thus, the district court properly found that "the disputes involved in the eviction

actions are not the same as the disputes involved in the franchisees' state court actions." 944 F. Supp. at 1022. In view of the strong federal policy of enforcing agreements to resolve disputes through arbitration, we find that DAI did not litigate substantial issues going to the merits of the franchisees' current claims, and thus did not waive arbitration.

Finally, the franchisees argue strenuously that they suffered various types of prejudice from these evictions, including the legal expense of defending the actions, the risk of losing their entire investment in their franchises and, for some of the franchisees, the money judgments or actual loss of their stores. Strictly speaking, in view of our holding above, it is not necessary for us to decide whether the franchisees suffered prejudice from being subject to these eviction actions. It is nevertheless clear to us that they did not suffer the type of prejudice that supports a finding of waiver.

We do not overlook the fact that several franchisees lost their entire investments in their franchises as a result of the judgments of possession DAI obtained. However, prejudice as defined by our cases refers to the inherent unfairness—in terms of delay, expense, or damage to a party's legal position—that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue. Stated in these terms, the franchisees have not shown any prejudice warranting a finding of waiver. First, the franchisees admit that DAI did not delay in moving to compel arbitration of their present claims in state court. 944 F. Supp. at 1021. Moreover, legal expenses inherent to litigation, "without more," do not constitute prejudice requiring a finding of waiver. Leadertex, 67 F.3d at 26. Finally, the franchisees have not shown that they will suffer "substantive" prej-

udice to their state-court claims if they are forced to arbitrate. See Lawrence, 833 F.2d at 1165. DAI has neither conducted discovery with respect to these claims nor made any motions going to the merits of the claims. Significantly, DAI has assured us that, in arbitration, it will not oppose any of the franchisees' claims on res judicata or collateral estoppel grounds due to the franchisees' failure to raise them in the prior eviction actions.

On these facts, we hold that DAI did not waive its right to compel arbitration of the franchisees' claims.

IV. Fraudulent Inducement of the Arbitration Agreement

The franchisees argue that the district court erred in rejecting, as a matter of law, their defense that DAI fraudulently induced them to accept the arbitration clause. Specifically, they claim that DAI (1) falsely represented in its offering circulars and franchise agreements that arbitration is a "condition precedent" to litigation, and (2) concealed the material fact that DAI "controls" its franchisees by instructing its assetless leasing companies to threaten or institute eviction proceedings. The district court found—even after considering the franchisees' last-minute affidavits—that there were no material issues of fact in dispute, and held that the franchisees had not "offered evidence from which it could be found" that DAI had made any false representations that induced their agreement to arbitrate. 944 F. Supp. at 1017-18.

It is clear that a court, not an arbitrator, resolves a claim that an arbitration clause—as opposed to the contract as a whole—was fraudulently induced. *Distajo I*, 66

F.3d at 457 (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967)). We apply state law "concerning the validity, revocability, and enforceability of contracts generally" to the issue whether DAI fraudulently induced the arbitration agreement. See Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987); Stuart, 85 F.3d at 979-80 (applying, without discussion, Connecticut law to franchisees' fraudulent inducement claim); Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela, 991 F.2d 42, 45-46 (2d Cir. 1993) (state law applies to whether parties agreed to arbitrate).

The franchisees maintain that we should apply Illinois law on fraudulent inducement. The district court applied Connecticut law pursuant to the choice-of-law clause in most of the relevant franchise agreements. It noted with respect to certain franchisees, whose contracts designated Florida or Illinois law as controlling, that DAI claimed, "without contradiction, that Florida and Illinois law do[ ] not differ" from Connecticut law on fraudulent inducement. 944 F.Supp at 1017 n.2. Thus, the franchisees waived this issue, and, as in *Distajo I*, 66 F.3d at 451, and *Stuart*, 85 F.3d at 979-80, we apply Connecticut law to their fraud claims.

It is well-settled under Connecticut law that to prove fraudulent inducement, a party must show "(1) that a false representation was made as a statement of fact; (2) that it was untrue and known to be untrue by the party making it; (3) that it was made to induce the other party to act on it; and (4) that the latter did so act on it to his injury." Stuart, 85 F.3d at 979 (citing Miller v. Appleby, 438 A.2d 811, 813 (Conn. 1981)). In *Stuart*, we held that Subway franchisees making similar allegations "utterly failed to allege, much less prove, sufficient facts indi-

cating that they were defrauded into agreeing to arbitrate." Stuart, 85 F.3d at 980. We explained that before purchasing their franchise, each franchisee received copies of DAI's standard franchise agreement and sublease, and that the relevant clauses pertaining to arbitration and eviction "were not camouflaged." Id. We thus found that DAI had not made any false representations to the franchisees regarding the possibility of eviction for violation of the franchise agreement.

The district court made identical factual findings in this case with respect to the franchisees' access to copies of the franchise agreement and sublease and the contents of those documents. It concluded that "[a]t most, [the franchisees] lacked understanding of the ramifications of two documents which they had ample opportunity to read and understand. . . . They cannot hold DAI as misrepresenting what is plainly stated in the documents nor the legal ramifications thereof." 944 F. Supp. at 1018; see Stuart, 85 F.3d at 980.

On this record, we too "find that the district court properly held, as a matter of law, that DAI did not fraudulently induce [the franchisees] into signing the agreement to arbitrate." Id.

V. Unconscionability and Failure of the Contract to Meet the Parties' Reasonable Expectations

The franchisees argue that issues of fact remain with respect to their defenses that the arbitration clause is void and unenforceable because it is (1) unconscionable, and (2) fails to meet their reasonable contractual expectations, see Restatement (Second) of Contracts § 211. In their answers in the district court, most of which were filed in October 1994, the franchisees alleged that the

franchise agreement was an adhesion contract that effectively forced them to arbitrate disputes under the agreement, yet allowed DAI to resolve such disputes through eviction proceedings. They also complained that the contract did not mention the alleged "excessive" costs of arbitration. Id.

The franchisees waived this argument by not raising it to the district court in their papers opposing DAI's motion, filed in February 1996, to forgo trial and receive judgment as a matter of law on all defenses to arbitration. In any event, the franchisees' claims are meritless. They urge us to "remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.' " Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985). Yet the franchisees have not presented a "well-supported" claim in this regard. In Doctor's Associates, Inc. v. Jabush, 89 F.3d 109 (2d Cir. 1996), we rejected a claim by Subway franchisees, who had been sued by DAI in eviction proceedings, that the arbitration clause was unconscionable. Id. at 112-13. We explained that the franchisees were not unfairly surprised or oppressed by DAI's resort to eviction proceedings because the "plain terms" of the sublease authorized such action. Id. at 113 (citing David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 923 F.2d 245, 249 (2d Cir. 1991). In *Stuart*, we rejected the franchisees' argument that the costs of arbitration rendered the contract unconscionable, observing that the franchise agreement clearly stated that the franchisees would have to pay standard arbitration costs. Stuart, 85 F.3d at 980-81. Thus, even if the franchisees had properly raised

these arguments, they would fail under the reasoning of our prior cases.

VI. Imposing Preliminary Injunctions Without Requiring a Bond

The franchisees argue that the district court abused its discretion by issuing preliminary injunctions in January and March 1996, without requiring DAI to post bonds pursuant to Fed.R.Civ.P. 65(c). In January 1996, after our remand in *Distajo I*, the district court enjoined the franchisees from prosecuting their state cases, finding that this relief was "necessary in aid of" federal jurisdiction. 944 F. Supp. 1007, 1008-09 (citing 28 U.S.C. § 2283). In its March 14 order compelling arbitration, the district court continued the injunction to "effectuate" that order. 944 F. Supp. at 1023. The district court did not require DAI to post a bond for either injunction because it found that defendants would not suffer damage or loss from being forced to arbitrate in lieu of prosecuting their state-court cases.

Rule 65(c) states, in relevant part, that

> [n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Id. In *Stuart*, we flatly rejected an identical argument that the district court should have required such a bond. Rule 65(c) gives the district court wide discretion to set the amount of a bond, and even to dispense with the bond requirement "where there has been no proof of

likelihood of harm, or where the injunctive order was issued 'to aid and preserve the court's jurisdiction over the subject matter involved.' " Stuart, 85 F.3d at 985 (citations omitted). As in *Stuart*, both circumstances apply in this case. We therefore hold that the district court did not abuse its discretion by entering the injunctions without requiring DAI to post bonds.

VII. Personal Jurisdiction over the Kanchwala Franchisees

The Kanchwala franchisees argue that the district court did not have personal jurisdiction over them. They allege that DAI violated 9 U.S.C. § 4 and Fed.R.Civ.P. 4(c) and 4(e)(1) by serving the Kanchwalas by mailing a copy of the summons and complaint to Mr. Duree, their attorney, instead of personally serving them. The Kanchwala franchisees also claim that the district court did not have personal jurisdiction and venue "by contract" because the validity of the arbitration contract was in dispute. They base this argument on the fact that in October 1995 an Illinois court held that the arbitration clause in the Kanchwalas' franchise agreement was void and unenforceable. Finally, they argue that "at the very least" the district court should have held a hearing under Fed.R.Civ.P. 12(d) to determine personal jurisdiction.

By not raising these issues in their papers filed in opposition to DAI's motion for judgment as a matter of law and by failing to request in the district court a hearing under Rule 12(d), the Kanchwalas consented to personal jurisdiction. In any event, faced with identical arguments in *Stuart*, we applied the long-standing principle that a party who agrees to arbitrate in a state (such as Connecticut) in which the FAA makes arbitration

agreements enforceable also consents to jurisdiction in whatever court could compel arbitration in that state. Stuart, 85 F.3d at 979 (citing Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 363 (2d Cir. 1964)). Moreover, we held that the AAA Rules, incorporated into all Subway franchise agreements, governed service of process and specifically allowed service by mail on a party's representative. Id. at 982. Finally, we decided that the district court had handled the question of personal jurisdiction correctly from a procedural point of view by holding a hearing on whether the arbitration agreement was enforceable. Id.; cf. AACon Auto Transp., Inc. v. Klee, 356 F. Supp. 319, 321 (S.D.N.Y. 1973) (district court may hold hearing to ascertain whether parties entered an agreement to arbitrate). We see no logical reason to reach a different result here, and thus hold that the district court did have personal jurisdiction over the Kanchwala franchisees.

VIII. Rooker-Feldman Doctrine

The franchisees argue, for the first time on appeal, that the district court lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine to order them to arbitrate and to enjoin them from prosecuting their state suits. They contend that DAI's petitions to compel arbitration represent impermissible attempts to "avoid" judgments the franchisees obtained in Illinois state court.

After DAI filed petitions in the district court to compel arbitration, two Illinois courts issued orders granting summary judgment to certain franchisees. Shino v. Doctor's Associates, Inc., No. 93-L-1293 (Cir. Ct. Madison County, Oct. 24, 1994); Kanchwala v. Doctor's Associ-

ates, Inc., No. 95-L-1292 (Cir. Ct. Madison County, Oct. 13, 1995). The Illinois courts held that DAI waived its right to arbitrate claims by those franchisees against whom DAI had filed eviction actions. The courts also held that the arbitration clauses in the franchise agreements were void and unenforceable because they (1) were unconscionable, (2) failed to meet the parties' reasonable contractual expectations, and (3) lacked mutuality.

Some explanation of the tangled proceedings in the Bickel case is also necessary. In December 1994, the Bickels filed an action against DAI in the Circuit Court of Madison County, Illinois, alleging fraud, various breaches of the franchise agreement, and seeking a declaration that the arbitration clause was unenforceable. In mid-January 1995, DAI promptly filed both a demand with the AAA for arbitration of the Bickels' claims and its present petition to compel arbitration. Because DAI did not appear in the Illinois action, the Bickels moved for and obtained from the Illinois court on February 7, 1995, a default judgment against DAI. That court scheduled a damage hearing for April.

Only days later, on February 13, the district court granted DAI's petition to compel arbitration of the Bickels' claims, and entered a preliminary injunction by endorsement enjoining the Bickels from further prosecuting their Illinois suit. In September 1995, in *Distajo I*, we reversed the district court's order compelling arbitration and vacated the preliminary injunction. Distajo I, 66 F.3d at 458. The mandate issued on November 29, 1995.

Thereafter, on December 5, 1995, the district court entered a temporary restraining order (TRO), again

enjoining the Bickels from prosecuting their state suit. The Bickels admit that they did not advise the Illinois court of this TRO. Consequently, on December 6, 1995, stating that it had been "advised" that our decision in *Distajo I* lifted the injunction against the Bickels, the Illinois court awarded the Bickels $400,000 in damages. The Bickels now argue that this $400,000 state court judgment strips the district court of subject matter jurisdiction to entertain DAI's petition to compel arbitration.

A challenge to a federal court's subject matter jurisdiction under the *Rooker-Feldman* doctrine "may be raised at any time by either party or *sua sponte* by the court." Moccio v. New York State Office of Court Admin., 95 F.3d 195, 198 (2d Cir. 1996) (citing Ritter v. Ross, 992 F.2d 750, 752 (7th Cir. 1993)). The doctrine evolved from the Supreme Court's opinions in D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983), and Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923). It rests on the principle that "a United States District Court has no authority to review final judgments of a state court in judicial proceedings." Feldman, 460 U.S. at 482; Rooker, 273 U.S. at 416. The *Feldman* Court thus held that a district court lacked subject matter jurisdiction to entertain a federal suit attacking a state court judgment against a particular individual. Feldman, 460 U.S. at 483-86. However, the Court held that a plaintiff could still bring in federal district court a general challenge to a state rule, id., unless the issues raised were "inextricably intertwined" with those resolved in the state judgment against the individual, id. at 482 n.16.

DAI complains that the franchisees' *Rooker-Feldman* argument merely restates their argument on appeal in *Distajo I* that the district court should have given preclusive effect to state court judgments holding the franchise

agreements to be void and unenforceable. We rejected that argument because the Illinois judgments were not final under that state's rule until the time for appeal had expired, and therefore not entitled to preclusive effect. Distajo I, 66 F.3d at 449-51.

Nevertheless, we cannot dismiss the franchisees' *Rooker-Feldman* argument based on the preclusion analysis applied in *Distajo I*. We did recently hold that the *Rooker-Feldman* doctrine "at a minimum" is coextensive with preclusion principles. Moccio, 95 F.3d at 199-200. Thus, subsequent litigation in federal court "will be barred under the *Rooker-Feldman* doctrine if it would be barred under the principles of preclusion." Id. at 200. However, a district court may lack subject matter jurisdiction under the *Rooker-Feldman* doctrine even when that court would not be precluded, under res judicata or collateral estoppel principles, by a prior state judgment. "It cannot be the meaning of *Rooker-Feldman* that, while the inferior federal courts are barred from reviewing *final* decisions of state courts, they are free to review interlocutory orders." Campbell v. Greisberger, 80 F.3d 703, 707 (2d Cir. 1996) (*Rooker-Feldman* challenge to interlocutory order); Gentner v. Shulman, 55 F.3d 87, 89 (2d Cir. 1995) (*Rooker-Feldman* applies whether an order is "final or interlocutory in nature"). Thus, our holding in *Distajo I* that preclusion did not attach to Illinois judgments that were not final does not resolve the franchisees' *Rooker-Feldman* claim.

Nevertheless, we hold that the *Rooker-Feldman* rationale does not bar jurisdiction over DAI petitions to compel arbitration. We cannot say that DAI is attempting to appeal from any of the state court decisions. See Gash Assoc. v. Village of Rosemont, 995 F.2d 726, 728 (7th Cir. 1993) (*Rooker-Feldman* prohibits a district court

from exercising an appellate function over a state court). Indeed, DAI filed its petitions to compel arbitration of the franchisees' state actions *before* the state courts had made any rulings on the merits in those actions. See Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133, 1143 (2d Cir. 1986), rev'd on other grounds, 481 U.S. 1 (1987) (*Rooker-Feldman* applicable "[o]nce a litigant has received an adverse adjudication" on an issue); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Doe, 868 F. Supp. 532, 538 (S.D.N.Y. 1994) (plaintiff was not seeking review of state court TRO because it filed its federal action before the state court issued the TRO). Moreover, with respect to the Bickels' $400,000 default judgment, the Bickels admit that they did not tell the Illinois court of the TRO entered by the district court after the remand in *Distajo I*. Finally, the parties have not cited, nor have we found, any cases applying the *Rooker-Feldman* doctrine to deprive a district court of subject matter jurisdiction over a petition to compel arbitration under 9 U.S.C. § 4. On these facts, we cannot say that the district court lacked jurisdiction under *Rooker-Feldman* to adjudicate DAI's petitions to compel arbitration.

IX. Abstention

The Bickels argue that, in view of the $400,000 Illinois state court judgment described above, the district court abused its discretion by not abstaining from exercising jurisdiction over DAI's petition to compel arbitration. The district court observed that this argument was a "slightly modified version" of the Bickels' unsuccessful argument that the district court was precluded from exercising jurisdiction by reason of the Illinois court's judgment. 944 F. Supp. at 1022. In addition, the

district court held that abstention under *Moses Cone* was not warranted because the Illinois court had not engaged in "substantial proceedings" in entering the default judgment against DAI, compared to the two years of proceedings already completed in the district court in these consolidated cases. Id. at 1022-23.

We review a district court's decision *not* to abstain for abuse of discretion. Tribune Co. v. Abiola, 66 F.3d 12, 15 (2d Cir. 1995); see Sheerbonnet, Ltd. v. American Exp. Bank Ltd., 17 F.3d 46, 48 (2d Cir.), cert. denied, 115 S.Ct. 67 (1994). This review is less "rigorous" than that required when a district court *does* abstain, because the district court has "considerably broader discretion" when denying a party's motion to abstain. Tribune, 66 F.3d at 15.

The franchisees have failed to articulate any persuasive reason why abstention would be proper in this case. Certainly, as the district court found, the Illinois default judgment, entered without an evidentiary hearing, does not constitute a "substantial" state proceeding warranting abstention under *Moses Cone*. See 460 U.S. at 21-22. We hold that the district court did not abuse its discretion by exercising jurisdiction over DAI's petition to compel arbitration of the Bickels' state-court claims.

X. Conclusion

We have considered all of the franchisees' arguments, and they are without merit. We affirm the judgment of the district court.

United States Court of Appeals
FOR THE SECOND CIRCUIT

Doctor's Associates, Inc.	)
v.	)
Emily Distajo, et al.	) Motion to Dismiss
	)

Dkt No: 96-7011

Filed
April 18, 1996

Doctor's Associates, Inc. ("DAI") requests that the appeal be dismissed, on the ground that it is moot.

ORDER

Hon. Feinberg, Leval, Parker, C.JJ.
Filed February 24, 1997.

IT IS HEREBY ORDERED that the motion be and it hereby is granted on the grounds that the appeal is moot.

2/24/97
Date

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 24th day of April, one thousand nine hundred and ninety-seven.

Doctor's Assoc. Inc.
Plaintiff-Appellee

v.

Dkt No: 96-7011
Filed April 24, 1997

Distajo
Defendant-Appellant

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Emily Distajo, et al.,

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 24th day of April, one thousand nine hundred and ninety-seven.

Doctor's Assoc. Inc.
Plaintiff-Appellee

v.

Dkt No: 96-7321
Filed April 24, 1997

Distajo
Defendant-Appellant

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Emily Distajo, et al.,

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
State of North Carolina
County of Gaston

No.

Michael Johnson,	*
	*
Plaintiff,	*
	*
vs.	*
	*
Doctor's Associates, Inc., et al.	*
	*
	*
Defendants.	*

ORDER

FINDINGS OF FACT: -

1. This action was commenced by the Plaintiff's filing a complaint seeking damages for misappropriation of funds;

2. The Plaintiff is a franchisee of several Subway Sandwich store franchises in North Carolina. Doctor's Associates is the franchiser;

3. The franchise agreement contains an arbitration clause which provides as follows:

> C. Any controversy or claim arising out of, or relating to this contract, or the breach thereof, shall be

> settled by arbitration in accordance with the commercial arbitration of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut, or whichever city in which the company is then headquartered, and judgment upon an award rendered by the arbitrators may be entered in any Court having jurisdiction thereof. The commencement of arbitration proceedings by an aggrieved party to settle disputes arising out of, or relating to this contract is a condition precedent to the commencement of legal action by either party.

4. In his complaint, Plaintiff alleges that the arbitration clause is void for illegality, lack of mutuality and fraud;

5. The Defendant Doctor's Associates, Inc., has filed a Motion to Dismiss for failure to state a claim and, in the alternative, a Motion to Stay the Proceedings pending completion of arbitration proceeding;

6. The hearing on these motions was held before the undersigned Judge;

7. After the hearing, the Court entered an order denying the Motion to Dismiss for failure to state a claim and ordering the parties to file supplemental briefs and affidavits on the issue of whether the Plaintiff waived his right to litigate by participating in arbitration;

Based on the evidence presented at the hearing, and as set forth in the supplemental affidavits, and after having considered the arguments of counsel, the Court makes the following additional findings of fact:

1. Doctor's Associates filed a demand for arbitration with the American Arbitration Association (AAA) on or about the 26th day of January 1993;

2. Attorney David W. Smith, III, acting on behalf of the Plaintiff, filed an answer and counterclaim on February 10, 1993, and also submitted a five hundred dollar administrative fee to the AAA;

3. In his answer the Plaintiff denied the allegations in Doctor's Associates' statement for arbitration and in his counterclaim, sought an award of damages based on his contention that an employee of Doctor's Associates had misappropriated the Plaintiff's funds. Plaintiff did not challenge the validity of the arbitration clause or object to the jurisdiction of AAA to arbitrate the parties' claims;

4. On April 7, 1993, Plaintiff filed an objection to the jurisdiction and authority of the AAA to proceed with arbitration. The basis for the objection was that the arbitration provision in the franchise agreement was void and unenforceable because of illegality, lack of mutuality and fraud;

5. On April 14, 1993, pursuant to Rule 8 of the Commercial Arbitration Rules of the AAA, Plaintiff filed a motion with the AAA to amend its counterclaim. The motion was filed "under protest" and specifically set forth the basis on which the Plaintiff contested the jurisdiction of the AAA to arbitrate the matters. On the same date, the Plaintiff filed with the AAA a motion to appoint additional arbitrators;

6. The AAA is currently holding the matter in abeyance pending the decision of this Court on whether the parties are required to arbitrate or may litigate the issues in dispute;

7. To this point, the AAA has appointed one arbitrator but it has not ruled on the Plaintiff's motions to appoint additional arbitrators or the Plaintiff's motion to file an amended counterclaim;

8. The parties have not exchanged exhibits or witness lists nor has any evidence been taken in the arbitration;

BASED ON THE FOREGOING FINDINGS OF FACT, THE COURT MAKES THE FOLLOWING CONCLUSION OF LAW:

1. This Court has jurisdiction over the parties and the subject matter of this order;

2. The Plaintiff's limited participation in the arbitration proceedings did not constitute a waiver of his right to challenge the enforceability of the arbitration clause;

IT IS THEREFORE ORDERED, ADJUSTED AND DECREED that Doctor's Associates' motions to dismiss or to stay these proceeding on the grounds that Plaintiff has waived his right to litigate the issues that are the subject of this action by participation in arbitration are denied.

This the 3rd day of May, 1994.

S/JOHN MULL GARDNER
Superior Court Judge Presiding

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
State of North Carolina
Gaston County

MICHAEL JOHNSON,	]	
	]	
Plaintiff,	]	
	]	
vs.	]	ORDER
	]	
DOCTORS ASSOCIATES, INC., et al.	]	
	]	
Defendants.	]	

THIS MATTER coming on to be heard and being heard before the undersigned Superior Court Judge presiding at the February 28, 1994, Gaston County Civil Term of Court upon Motions to Dismiss for failure to state a claim under Rule 12 (b) (6) of the North Carolina Rules of Civil Procedure; such Motions being brought by defendants Doctors Associates, Inc., Frederick Deluca, Peter Buck, Franchise World Headquarters, Inc., Peter Slomianyj, and North Carolina Subway Group, Inc., by their respective counsel; and it appearing to the Court after arguments by counsel for all parties involved that the Complaint does state a claim;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the moving Defendants' Motions to Dismiss for failure to state a claim pursuant to Rule 12 (b) (6) of the North Carolina Rules of Civil Procedure be and hereby are denied.

This the 17th day of May, 1994.

S/JOHN MULL GARDNER
Superior Court Judge Presiding

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
State of North Carolina
Gaston County

MICHAEL JOHNSON,	]
	]
Plaintiff,	]
	]
vs.	]
	]
DOCTORS ASSOCIATES, INC., et al.	]
	]
Defendants.	]

AMENDED ORDER

Pursuant to Rule 60 (a) of the North Carolina Rules of Civil Procedure, the May 3, 1994 Order entered in the captioned matter is hereby amended as follows:

1. Paragraph 5 of the Findings of Fact (beginning on page 1 of the Order) is stricken and is replaced with the following:

> 5. The Defendants Doctors Associates, Frederick DeLuca, Peter Buck, Franchise World Headquarters, Inc., Peter Slomianyj and North Carolina Subway Group, Inc., have filed Motions to Dismiss for failure to state a claim and, in the alternative, Motions to Stay the

Proceedings pending completion of arbitration proceedings;

2. Paragraph 7 of the Findings of Fact (page 2 of the Order) is stricken and is replaced with the following:

7. After the hearing, the Court ordered the parties to file supplemental briefs and affidavits on the issue of whether Plaintiff waived his right to litigate by participating in arbitration;

3. The final paragraph of the Order is stricken and is replaced with the following:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motions brought by all moving Defendants Doctors Associates, Inc., Frederick Deluca, Peter Buck, Franchise World Headquarters, Inc., Peter Slomianyj and North Carolina Subway Group, Inc., -- to dismiss or to stay these proceedings on the grounds that Plaintiff has waived his right to litigate the issues that are the subject of this action by participation in the arbitration are denied.

4. The May 3, 1994 order shall remain the same in all other respects.

This the 17th day of May, 1994.

S/_____
JOHN MULL GARDNER
Superior Court Judge Presiding

U.S. DISTRICT COURT
District of Connecticut (New Haven)

Doctor's Associates v. Johnson Filed 5/18/94

Cause: 09:1 U.S. Arbitration Act

DOCTOR'S ASSOCIATES, INC.

Plaintiff

v.

MICHAEL JOHNSON

Defendant

Proceedings include all events.

5/18/94 1 MOTION by Doctor's Associates to Compel Arbitration Filing Fee

$120.00 Receipt #129204 (paz)

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
State of North Carolina
Gaston County

MICHAEL JOHNSON,	:
	:
Plaintiff.	:
	:
vs.	:
	:
DOCTORS ASSOCIATES, INC., et al.	:
	:
	:
Defendants.	:

NOTICE OF APPEAL

NOW COME Defendants, Doctors Associates, Inc., Frederick Deluca, Peter Buck, and Franchise World Headquarters, Inc., and hereby give Notice of Appeal to the North Carolina Court of Appeals, pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure; this Appeal is taken from three (3) Orders entered by Superior Court Judge Gardner, presiding in Gaston County, North Carolina, as follows:

1. Order dated May 3, 1994, denying said Defendants' Motions to Dismiss or Stay these proceedings pending Arbitration;

2. Amended Order dated May 18, 1994; and

3. Order dated May 18, 1994, denying these Defendants' Rule 12 (b) (6) Motion to Dismiss.

THIS the 25th day of May, 1994.

SIGNATURES

IN THE CIRCUIT COURT FOR THE THIRD JUDICIAL CIRCUIT

State of Illinois
Madison County

JULIE SHINO, et al.,	) Cause No. 93-L-1293
and	)
LOUIS LEONNEKE,	)
et al.,	) Cause No. 93-L-1294
and	)
ALVARO GUERERO,	)
et al.,	) Cause No. 93-L-1295
and	)
WESAM S. YOUMARAN	) Cause No. 93-L-1296
et al..,	)
and	)
JOSE ALBERTO	)
BRENES,	) Cause No. 93-L-1297
and	)
EMILY DISTAJO,	)
et al.,	) Cause No. 94-L-155
and	)
RONALD & PATRICIA	) Cause No. 94-L-799
ROTHMUND,	)
and	)
JOHN S . PAPALEO,	)
et al.,	) Cause No. 94-L-765
	)
Plaintiffs,	)
	) (Consolidated for
vs.	) pre-trial motion
	) purposes)
DOCTOR'S ASSOCIATES,	)
INC., et al.,	)
	) FILED 10/24/94
Defendants.	)

JUDGMENT

The Court being advised in the premises, the Motion of the Plaintiffs, in all eight cases, for Partial Summary Judgment on Count VI of the Complaints as amended in the first six cases, and Count II of the Complaints in the last two cases listed above, to declare the arbitration clauses in the franchise agreements void and unenforceable, is heard and granted.

Partial Summary Judgment is entered in favor of the Plaintiffs, in all eight cases, and against the Defendants. The Court declares the arbitration clauses in the franchise agreements at issue, in all eight cases, to be void and unenforceable and judgment on that issue is entered in favor of the Plaintiffs and against the Defendants.

The Court finds that Doctor's Associates, Inc. waived the right to enforce the arbitration clauses in the *Youmaran, Guerrero, Brenes, Distajo, Rothmund* and *Papaleo* cases by filing eviction lawsuits against those Plaintiffs in the name of Subway Sandwich Shops, Inc. or Subway Restaurants, Inc., subleasing companies which were dominated and controlled by Doctor's Associates, Inc.

These eviction lawsuits alleged breaches of the franchise agreements by the franchisees-sub-lessees, Youmaran, Guerrero, Brenes, Distajo, Rothmund and Papaleo. In the Rothmund eviction lawsuit Subway Restaurants, Inc. obtained a judgment for possession and $4,061.87 in damages.

The act of filing these eviction lawsuits was an act of Doctor's Associates, Inc. by which Doctor's Associates, Inc. waived its right to compel arbitration under the arbitration clauses in the franchise agreements with respect to the Plaintiffs in these six cases. *Yates v. Doctor's Associates, Inc.*, 193 Ill. App. 3d

431, 549 N.E. 2d 1010 (Ill. App. 1990). *St. Mary's Medical Center of Evansville, Inc. v. Disco Aluminum Products Co., Inc.*, 969 F. 2d 585 (7th Cir. 1992).

The Court further finds that all Defendants in the first six cases have waived the right to compel arbitration by seeking a litigation advantage in the cases now before the Court by moving for a change of venue, unsuccessfully, and by thereafter moving to dismiss the complaints, or in the alternative, to transfer these cases to Cook County, IL under the doctrine of forum non conveniens. The Court has also denied that motion. These defendants have appealed that ruling to the Illinois Court of Appeals, where it is now pending. Prior to moving to dismiss or transfer for lack of venue and prior to moving to dismiss or transfer under the forum non conveniens doctrine, these Defendants withdrew their motion, before this Court, to stay this litigation pending arbitration, before the Court could rule on that motion. The Court finds that these Defendants have therefore voluntarily participated in this litigation, after withdrawing their Motion to Stay Pending Arbitration, and that these Defendants have attempted to obtain a litigation advantage by such participation. As a result, these Defendants have waived their right to compel arbitration.

The Court further finds that the arbitration clauses in the franchise agreements in all eight cases are unenforceable because they lack mutuality. The arbitration clauses provide that arbitration is a condition precedent to litigation by either party. Doctor's Associates, Inc., however, is not bound by this condition, because it uses the subleasing companies which it controls and dominates to file eviction lawsuits against the franchisees, without first submitting the issue to arbitration. The subleases do not contain an arbitration clause entitling the franchisees/sub-lessees to compel arbitration, in the event an eviction lawsuit

is filed against them. Doctor's Associates, Inc. regularly attempts, initially, to resolve its disputes against its franchisees by filing eviction lawsuits, in the name of its subleasing companies, without first resorting to arbitration. As a result, the arbitration clauses in the franchise agreements lack mutuality because, while such clauses are binding on the franchisees, they are not binding on Doctor's Associates, Inc., which can employ its totally controlled and dominated subleasing companies to file eviction lawsuits against the franchisees and sublessees to resolve disputes arising under the franchise agreement. Since the arbitration clauses in the franchise agreements, including the provision that arbitration is a condition precedent to litigation, are not binding on Doctor's Associates, Inc., they are not mutually enforceable, and therefore are unenforceable by Doctor's Associates, Inc. *Hull v. Norcom, Inc.*, 750 F. 2d 1147 (11th Cir. 1985). *Matterhorn, Inc. v. NCR Corp.*, 763 F. 2d 866 (7th Cir. 1985).

The Court further finds that the arbitration clauses in the franchise agreements in all eight cases are unenforceable because they are unconscionable, in that the arbitration clauses require arbitration in Connecticut, of a dispute between Illinois residents and franchisees and Doctor's Associates, Inc., a Florida corporation which maintains its principal office and place of business in Florida. *Miller v. AAACon Auto Transport, Inc.*, 434 F. Supp. 40 (S.D. Fla. 1977), affirmed 614 F. 2d 292 (5th Cir. 1980), cert. denied, 101 S. Ct. 315, 449 U.S. 918, 63 L. Ed. 2d 1945 (1980), *AAACon Auto Transport v. State Farm Mutual Ins.*, 537 F. 2d 648 (2nd Cir. 1976), cert. denied, 429 U.S. 1042, 97 S. Ct. 742, 50 L. Ed. 2d 754 (1977); *Aluminum Products Distributors, Inc. v. AAACon Auto Transport, Inc.*, 404 F. Supp. 1374 (W.D. Okla. 1975); *Patterson v. ITT Consumer Financial Corp.*, 1B Cal. Rptr. 2nd 563,

14 Cal. App. 4 th 1659 (Cal. App. 1st Dist. 1993); *Bell v. Congress Mortg. Co., Inc.*, 30 Cal. Rptr. 2nd 205 (Cal. App. 1st Dist. 1994); *Broemmer v. Abortion Services of Phoenix*, 840 P. 2d 1013 (Ariz. 1992); *Obstetrics and Gynecologists v. Pepper*, 693 P.2d 1259 (Nov. 1985).

The Court finds that these contractual defenses to the enforcement of the arbitration clauses are equally valid under the Federal Arbitration Act, 9 U.S.C. §1 et seq and under the Illinois Arbitration Act, 710 ILCS §5/1 et seq, and therefore, this Court does not need to determine whether the Federal Arbitration Act or the Illinois Arbitration Act is the controlling act with respect to the issue now before the Court.

The Court further finds that there are no genuine material issues of fact in dispute with respect to these issues concerning the enforceability of the arbitration clauses in the franchise agreements, and that the Plaintiffs, in all eight cases, are entitled to prevail as a matter of law; partial summary judgment is therefore entered in favor of the Plaintiffs in all eight cases pursuant to Illinois Supreme Court Rule 192 and 735 ILCS § 5/2-1005.

The Court further finds that only Doctor's Associates, Inc., among the Defendants, in these eight cases, is a party to the franchise agreements containing the arbitration clauses. To the extent any of the other Defendants claim a right, or may claim a right, to compel arbitration, or to stay litigation pending arbitration, those Defendants are not entitled to enforce the arbitration clauses for the same reasons that Doctor's Associates, Inc. is not entitled to enforce the arbitration clauses and further, because these Defendants are not parties to the agreements containing the arbitration clauses.

The Court further finds that the Complainants claim the arbitration clauses in the franchise

agreements are not enforceable because the Plaintiffs were fraudulently induced into the agreements, with respect to the arbitration issue, but that this defense to arbitration has not been raised by the Motions for partial Summary Judgment, and, therefore, the Court does not consider that issue in ruling on the Motion for Partial Summary Judgment.

The Court further finds that the Defendants are entitled to file an appeal as a matter of right to this judgment under Illinois Supreme Court Rule 307.

The Court further finds that this is a final and appealable order and judgment under Illinois Supreme Court Rule 304 (a) in that there is no just reason for delaying either the enforcement of or the appeal from this judgment and order.

ENTERED this 24th day of October, 1994.

S/_____

JUDGE P.J. O'Neil

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
State of Illinois
Madison County

SANDRA BICKEL, and RAYMOND BICKEL,	)	
Plaintiffs,	)	FILED 2/7/95
v.	)	DEFAULT JUDGMENT
DOCTOR'S ASSOCIATES, INC., et. al,	)	94-L-1428
Defendants.	)	

DEFAULT JUDGMENT

Pursuant to Plaintiffs' Motion for Default Judgment, Default Judgment is hereby entered in favor of Plaintiffs and against Defendants Doctor's Associates, Inc. and Subway Development of Chicagoland, Inc. as follows:

1. On Count I judgment by default is entered against Doctor's Associates, Inc. and Subway Development of Chicagoland, Inc. and in favor of Plaintiffs on the issue of liability. A damage hearing against these two Defendants is set for the 4th day of April, 1995.

2. On Count II judgment by default is entered against Doctor's Associates, Inc. and Subway Development of Chicagoland, Inc. and in favor of Plaintiffs on the issue of liability. A damage hearing against these two Defendants is set for the 4th day of April, 1995.

3. On Count III judgment by default is entered against Doctor's Associates, Inc. and Subway Development of Chicagoland, Inc. and in favor of Plaintiffs on the issue of liability. A damage hearing against these two Defendants is set for the 4th day of April, 1995.

4. Default judgment is also entered in favor of Plaintiffs and against Defendants Doctor's Associates, Inc. and Subway Development of Chicagoland, Inc. on Count IV for a declaratory judgment, and the Court finds that based upon the evidence adduced in support of the Motion for Default Judgment, with respect to Count IV, that the arbitration clause is void and unenforceable because the Franchise Agreement lacks mutuality, because the Franchise Agreement requiring arbitration in Connecticut, between the Plaintiffs, Illinois franchisees, and Doctor's Associates, Inc., a Florida franchisor, is unconscionable: the arbitration clause is also unenforceable because it is a contract of adhesion, and does not meet the reasonable expectations of the parties, as required by Restatement of Contracts, Second, §211. The Court further finds that the Mutual Release required by Doctor's Associates, Inc. to be executed by the Plaintiffs as a condition for the sale of their franchise and store is void because such mandatory condition was not disclosed to the Bickels in the Offering Circular and related documents as required by the Illinois Franchise Disclosure Act, 815 ILCS 705/1, and because such non-disclosure is an unlawful and unfair trade practice in violation of the Illinois Consumer Protective Act, 815 ILCS §505/1, and because such Mutual Release was obtained by duress and cohesion, in that the Bickels were required to sign such a release as a condition for being permitted to sell their store and franchise. The Court finds that the arbitration clause is void

and unenforceable and that the Mutual Release executed by the Bickels as a condition for selling their store and franchise is void and unenforceable.

5. This default judgment against Doctor's Associates, Inc. and Subway Development of Chicagoland, Inc. on all four Counts of the Complaint is hereby declared to be a final and appealable judgment pursuant to Illinois Supreme Court Rule 304 (a), in that the Court finds that there is no just reason for delaying either the enforcement or the appeal from this judgment, or both.

Entered this 7th day of February, 1995.

S/Judge Phillip J. Kardis

IN THE CIRCUIT COURT FOR
THE THIRD JUDICIAL CIRCUIT
State of Illinois
Madison County

SANDRA BICKEL and RAYMOND BICKEL	)	
	)	FILED 12/6/95
Plaintiffs,	)	
	)	Cause No.
v.	)	94-L-1428
	)	
DOCTOR'S ASSOCIATES, INC., et al	)	
	)	
Defendants.	)	

ORDER AND JUDGMENT
ORDER

The Court being advised in the premises, the motions of Edward Wood Dunham, Kevin Kennedy and Wiggin & Dana for leave to enter their appearance pro hac vice for all Defendants is heard and granted.

The motion of Doctor's Associates, Inc. and Subway Development of Chicagoland, Inc. to set aside the default judgment of February 7, 1995, having been previously briefed, and having been previously orally argued on April 4, 1995, is heard and overruled.

Pursuant to the oral motion of the Plaintiffs, the claim for punitive damages against Defendants Doctor's Associates, Inc. and Subway Development of Chicagoland, Inc. is hereby severed from the remaining claims against those Defendants, for determination at a later date.

JUDGMENT

The default judgment of February 7, 1995 scheduled a damage hearing for April 4, 1995. The affidavit of Sandra Bickel established that Plaintiffs suffered actual damages in the sum of $400,000.00. Defendants Doctor's Associates, Inc. and Subway Development of Chicagoland, Inc. offered no contrary evidence. While the preliminary injunction issued by the United States District Court for Connecticut previously enjoined the Plaintiffs from persecuting their claims against any of the Defendants in this case, it did not enjoin either Doctor's Associates, Inc. or Subway Development of Chicagoland, Inc. The Court has been advised that the preliminary injunction issued by the United States District Court for the district of Connecticut has been reversed by the United States Court of Appeals for the Second Circuit in appeal number 95-7183 in an opinion issued on or about September 12, 1995. The Court has further been advised that the appellate Court judgment reversing the preliminary injunction is now final in that the United States Court of Appeals for the Second Circuit will very soon issue its mandate to the United States District Court for Connecticut.

This Court, being advised that the Plaintiffs are no longer enjoined from proceeding with their claims against any of the Defendants in this case, including Doctor's Associates, Inc. and Subway Development of Chicagoland, Inc., hereby enters judgment in favor of Plaintiffs, Sandra Bickel and Raymond Bickel and against Defendants, Doctor's Associates, Inc. and Subway Development of Chicagoland, Inc., jointly and severally, for actual damages, in the sum of $400,000.00, plus Court costs.

This Court has severed the claim for punitive damages against Defendants Doctor's Associates, Inc.

and Subway Development of Chicagoland, Inc. for determination at a later date, as set forth in the order above.

This judgment is hereby declared to be a final and appealable judgment to Illinois Supreme Court Rule 304(a) in that the Court finds that there is no just reason for delaying either the enforcement or the appeal from this judgment, or both.

Entered this 6th day of December, 1995.

S/_____

Judge

IN THE CIRCUIT COURT FOR THE THIRD JUDICIAL DISTRICT

MADISON COUNTY, ILLINOIS

MIKE (MUSHTAQ) KANCHWALA, ANVER KANCHWALA, and AZIM HEMANI,	)	
Plaintiffs,	)	Cause No. 95-L-1291
v.	)	
DOCTOR'S ASSOCIATES, INC., et al.	)	FILED 10/13/95
Defendants.	)	

JUDGMENT

The Court being advised in the premises, the motion of Plaintiffs for Summary Judgment that the arbitration clause is void and unenforceable is heard and granted.

Summary Judgment is entered in favor of Plaintiffs and against Defendants, Doctor's Associates, Inc., Frederick A. Deluca, Peter H. Buck and Subway Restaurants, Inc.

The Court declares the arbitration clauses in the franchise agreement at issue to be void and unenforceable and judgment on that issue is entered in favor of the Plaintiffs and against Defendants, Doctor's Associates, Inc., Frederick A. Deluca, Peter H. Buck and Subway Restaurants, Inc.

Some of the same issues were before the Madison County Circuit Court in the eight consolidated cases, for

pre-trial motion purposes, Julie Shino, et al. v. Doctor's Associates, Inc., et al., Cause No. 93-L-1293, and were before the Court in Bickel v. Doctor's Associates, Inc., et al., Cause No. 94-L-1428, and were also before the Court in Stuart, et al. v. Doctor's Associates, Inc., et al., Madison County, Illinois, Cause No. 95-L-1050.

For the same reasons that formed the basis for the Madison County, Illinois Circuit Court judgments of October 24, 1994 in Julie Shino, et al. v. Doctor's Associates, Inc., Madison County, Illinois Cause No. 93-L-1293, and for the same reasons for the default judgment of the Madison County, Illinois Circuit Court on Count IV for declaratory judgment in Madison County, Illinois Cause No. 95-L-1428, and for the same reasons for the entry of summary judgment in favor of the Plaintiff, franchisees by the Madison County, Illinois Circuit Court in Cause No. 95-L-1050, and for the reasons set forth in the Motion for Summary Judgment in the instant case, as supported by the Affidavit and attached Exhibits, the Court finds that the arbitration clause in the franchise agreements is unenforceable because it lacks mutuality.

The Court further finds that Doctor's Associates, Inc. waived its right to compel arbitration by filing an eviction lawsuit in the name of its leasing company, Subway Restaurants, Inc., and obtaining a judgment against the Plaintiffs here, in Will County, Illinois, for damages, possession and attorneys fees claimed under the franchise agreement between the Plaintiffs here and Doctor's Associates, Inc.

The Illinois Court of appeals has previously held that such eviction lawsuits waive the right of Doctor's Associates, Inc. to compel arbitration. Yates v. Doctor's Associates, Inc., 193 Ill. App. 3d 431, 549 N.E. 2d 1010 (Ill. App. 1990); St. Mary's Medical Center of

Evansville, Inc. v. Disco Aluminum Products Co., Inc., 969 F. 2d 585 (7th Cir. 1992).

The Court further finds that the arbitration clause is unenforceable because it is unconscionable and because it fails to meet the reasonable expectations of the parties as required by the principles of Restatement of Contracts, Second § 211, in that Doctor's Associates, Inc. reserves the right to file lawsuits against its franchisees, in the name of its alter-ego/agent leasing companies, such as Subway Restaurants, Inc. to resolve claims of Doctor's Associates, Inc. against the franchisees arising out of the franchise agreement, while requiring the franchisees to arbitrate their related claims before the American Arbitration Association in Connecticut. Miller v. AAACon Auto Transport, Inc., 434 F. Supp. 40 (S.D. Fla. 1977), affirmed 614 F. 2d 292 (5th Cir. 1980), cert. denied, 101 S. Ct. 315, 449 U.S. 918, 63 L. Ed. 2d 1945 (1980); AAACon Auto Transport v. State Farm Mutual Ins., 537 F. 2d 268 (2nd Cir. 1976), cert. denied, 429 U.S. 1042, 97 S. Ct. 742, 50 L. Ed. 2d 754 (1977); Aluminum Products Distributors, Inc. v. AAACon Auto Transport, Inc., 404 F. Supp. 1374 (W.D. Okla. 1975); Patterson v. ITT Consumer Financial Corp., 18 Cal. Rptr. 2d 563, 14 Cal. App. 4th 1659 (Cal. App. 1st Dist. 1993); Bell v. Congress Mortg. Co., Inc., 30 Cal. Rptr. 2d 205 (Cal. App. 1st Dist. 1994); Broemmer v. Abortion Services of Phoenix, 840 P. 2d 1013 (Ariz. 1992); Obstetrics and Gynecologists v. Pepper, 693 P. 2d 1259 (Nev. 1985); Graham Oil Co. v. Arco Products Co., 43 F. 3d 1244 (9th Cir. 1994) and Prudential Ins. Co. of America v. Lai, 42 F. 3d 1299 (9th Cir. 1994).

The finds that the arbitration clause lacks mutuality under the principles of Hull v. Norcom, Inc., 750 F. 2d 1147 (11th Cir. 1985); Matterhorn, Inc. v. NCR Corp., 763 F. 2d 866 (7th Cir. 1985).

The Court finds that there are no genuine material issues of fact and dispute with respect to these issues concerning the enforceability of the arbitration clauses in the franchise agreement and that Plaintiffs are entitled to prevail as a matter of law. Summary Judgment is therefore entered in favor of the Plaintiffs and against the Defendants, Doctor's Associates, Inc., Frederick A. Deluca, Peter H. Buck and Subway Restaurants, Inc. on Count I of the complaint for a declaratory judgment that the arbitration clause is void and unenforceable, pursuant to Illinois Supreme Court Rule 192 and 735 ILCS § 5/2-1005.

The Court further declares that this is a final and appealable order and judgment under Illinois Supreme Court Rule 304 (a) in that there is no just reason for denying either the enforcement of or the appeal from this judgment and order, or both.

ENTERED this 13th day of October, 1995.

S/_____

Judge A.A. Matoesian

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DOCTOR'S ASSOCIATES, INC.	
Plaintiff,	
v.	CASE NO: 394CV00349PCD
EMILY DISTAJO, et al.	(Consolidated Actions)
Defendants.	

DOCTOR'S ASSOCIATES, INC.	
Plaintiff,	
v.	CASE NO. 395CV00120PCD
RAYMOND and SANDRA BICKEL,	December 5, 1995
Defendants.	

MOTION FOR TEMPORARY RESTRAINING ORDER

Pursuant to Fed. R. Civ. P. 65 and based on the supporting memorandum of law filed herewith, plaintiff Doctor's Associates, Inc. ("DAI") hereby moves for a temporary restraining order to enjoin defendants from prosecuting or in any way advancing their state court lawsuits.

PLAINTIFF
DOCTOR'S ASSOCIATES, INC.

By_____
Edward Wood Dunham
Hand Written Endorsement

Granted, December 5, 1995
Judge Dorsey
Filed December 5, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Filed Jan. 3, 1996

DOCTOR'S ASSOCIATES, INC. Plaintiff,	:
vs.	: Civil No. : 3:94CV00349PCD
EMILY DISTAJO, ET AL. Defendants.	: (Consolidated : Actions)

RULING ON MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Doctor's Associates, Inc. ("DAI") is the national franchisor of Subway Sandwich Shops, and defendants are Subway franchisees. The parties entered into standard franchise agreements, which required arbitration of all contractual disputes in Bridgeport, Connecticut, under Connecticut law. When contractual disputes did arise, the franchisees sought judgments against DAI in numerous state courts around the country. DAI has petitioned this court to compel arbitration of the franchise disputes pursuant to 9 U.S.C. § 4. DAI presently seeks an injunction of the franchisees' state court actions until the arbitration question is decided by this court in these seventeen consolidated cases.

I. DISCUSSION

A. Likelihood of Success on the Merits, Irreparable Harm, Balance of Hardships

The franchisees oppose DAI's motion on a number of grounds that have been considered in previous decisions, the substance of which will not be repeated at length. DAI has satisfied the standard for issuance of

a preliminary injunction by demonstrating a likelihood of success on the merits and irreparable harm should the injunction not be granted. *See Toy Mfrs. Of Am., Inc. v. Blumenthal,* 806 F. Supp. 336, 340 (D. Conn. 1992), *aff'd,* 986 F. 2d 615 (2d Cir. 1993). If DAI must continue to litigate in multiple state courts, its costs will be substantial and non-recoverable. Further, DAI will face difficulty in conducting its business if courts in different states render inconsistent judgments and so not apply the franchise agreement uniformly.[1]

On the other hand, the franchisees will lose nothing if an injunction is granted, except the opportunity to argue their cases in state court at the present time. In fact, the franchisees would gain from an injunction because each of them could proceed in a single forum, rather than incurring the time and expense of dual litigation in federal and state court. Thus, the equities tip decidedly in favor of granting the relief requested.

B. Anti-Injunction Act

Under normal circumstances, the foregoing would end the discussion. In the instant matter, however, the relief sought is governed by the Anti-Injunction Act, 28 U.S.C. § 2283.[2] The Anti-Injunction Act forbids federal

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[1] DAI may never enjoy a perfectly uniform application of the franchise agreement: arbitration has not been required for the franchisee John McCrary, *Doctor's Assoc., Inc. v. Distajo*, 66 F. 3d 438, 447-49 (2d Cir. 1995), but may yet be compelled for other franchisees. *See id.* At 458 (vacating injunction and remanding issues for consideration). Although perfect uniformity may, at this stage, be unobtainable, DAI still has a strong interest in having the arbitration question resolved as to the remaining franchisees in a consistent manner.

[2] Also relevant is the policy favoring "rapid and unobstructed enforcement of arbitration agreements." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 23 (1983).

courts from staying state court proceedings, subject to exceptions that are narrow and are not to be enlarged by loose statutory construction. *See Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988); *see also Atl. Coast Line R.R. Co. v. Bhd. Of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970).

1. *Necessary in Aid of Federal Jurisdiction*

One exception to the Anti-Injunction Act permits a federal court to stay state court proceedings when "necessary in aid of its injunction." 28 U.S.C. § 2283 (1994). In *Standard Microsystems Corporation v. Texas Instruments Incorporated*, 916 F. 2d 58 (2d Cir. 1990), the Second Circuit cited *In re Baldwin-United Corporation*, 770 F. 2d 328, 337 (2d Cir. 1985), for the proposition that the "necessary in aid of" exception encompasses "circumstances...where a federal court is on the verge of settling a complex matter, and state court proceedings may undermine its ability to achieve that objective..." 916 F. 2d at 60. In *Baldwin*, the Second Circuit upheld an injunction because the district court was about to approve a settlement that was threatened by parallel state court litigation. 770 F. 2d at 337. *See also James v. Bellotti*, 733 F. 2d 989, 993-94 (1st Cir. 1984) (provisional settlement would support a protective injunction).

These cases are instructive. Although this Court is not on the verge of approving a settlement, it is on the verge of resolving this matter. Only two issues remanded by the Court of Appeals remain to be decided. *See Doctor's Assocs., Inc.*, 66 F. 3d at 458 (fraud in inducing the franchise agreement and waiver of the right to arbitrate). These issues will be heard on

February 5, 1996, after completion of discovery, and will thereafter be decided promptly.[3]

Also instructive is the principle that the "necessary in aid of" exception "is meant 'to give sufficient flexibility that a federal Court, as a Court of equity, may...deal adequately with the situation at hand.'" *James*, 733 F. 2d at 993 (quoting 1A MOORE'S FEDERAL PRACTICE ¶ 0.208a [2] at 2336 (citation omitted)). In light of this consideration, numerous factors favor enjoining the franchisees' state court actions:

> The parties, lawyers, and witnesses could be spared great time and expense if the arbitration question is litigated in a single forum, rather than in numerous proceedings across the country. DAI has thousands of franchisees, and the franchisees have pressed their disputes in courts in at least five different states, including Alabama, Illinois, Massachusetts, North Carolina, and Pennsylvania. Judicial resources could be conserved by avoiding duplicative consideration by numerous judges of the same issues. Judicial economy could also be served because this Court has already

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[3] Indeed, it seems that it will be eminently possible to decide these issues quickly given that, in a number of the consolidated cases, DAI has represented, without contradiction by the franchisees, that there is no factual foundation for the remaining defenses. (Of course, discovery remains to be completed, and the issues have not been finally briefed for determination).

acquired substantial familiarity with the issues presented, having had jurisdiction over these and related disputes for over eighteen months. Comity between federal and state Courts could be preserved by avoiding conflicting judgments. At least one state Court has shown a willingness to decide an issue in a manner contrary to a previously rendered federal judgment. *Compare Kanchwala v. Doctor's Assocs., Inc.*, No. 95-L-1291 (Cir. Ct. 3d Jud. Dist., Madison County Ill. filed Oct 13, 1995) at 2 ("[T]he arbitration clause in the franchise agreements is unenforceable because it lacks mutuality.") *with Doctor's Assocs., Inc.*, 66 F. 3d at 458 ("We affirm the district Court's holding that 'mutuality' was not at issue...[W]here consideration supports a contract as a whole, an arbitration clause in that contract in not void for lack of consideration.") (decided Sept. 12, 1995). The arbitration agreement expresses the parties' interest in resolving franchise disputes in a single forum. Enjoining multiple state Court proceedings will best preserve this interest in a single forum. Although it is presumed that the state courts are equally competent to resolve the issues presented, DAI has asserted, without contradiction by the

> franchisees, that the state courts have rushed to judgment without allowing the parties adequate time for discovery or other trial preparation.

The foregoing demonstrates that this is an instance where injunctive relief is "necessary to prevent...state court[s] from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Atl. Coast Line R.R. Co.*, 398 U.S. at 295 (dicta); *see also In re Corrugated Container Antitrust Litig.*, 659 F. 2d 1332, 1334-35 (5th Cir. 1981) (citing *Atlantic Coast Line* where a "complicated antitrust action...required a great deal of the district court's time...[and a state court's actions] would clearly [have] interfere[d] with the multidistrict court's ability to dispose of the broader action pending before it"), *cert. denied sub nom. Three J Farms, Inc. v. Pls.' Steering Comm.*, 456 U.S. 936 (1982).

2. Necessary to Protect or Effectuate Federal Judgment

Another exception to the Anti-Injunction Act permits a federal court to stay state court proceedings when "necessary...to protect or effectuate its judgments." 28 U.S.C. § 2283 (1994). This exception is commonly known as the "relitigation" exception because it permits enjoining state litigation of an issue that was previously presented to and decided by the federal court. *See Kidder, Peabody & Co., Inc. v. Maxus Energy Corp.*, 925 F. 2d 556, 565, (2d Cir. 1991), *cert. denied*, 501 U.S. 1218 (1991).

The "relitigation" exception does not authorize enjoining state litigation of issues on which the federal court's decision was reversed. *Woods Exploration & Producing Co. v. Aluminum Co. Of Am.*, 438 F. 2d

1286, 1315 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1991). Because the Court of Appeals rejected this court's determination of the waiver and fraud issues, *Doctor's Assocs., Inc.*, 66 F. 3d at 458, the "relitigation" exception is not a basis for enjoining state litigation of these questions.

The "relitigation" exception, however, does authorize enjoining state litigation of issues on which the federal court's judgment was affirmed. *See Cowgill v. Raymark Indus., Inc.*, 832 F. 2d 798, 802 (3d Cir. 1987) ("When a court of appeals reverses a judgment and remands for further consideration of a particular issue, leaving other determinations of the trial court intact, the unreversed determinations continue to work an estoppel.") (discussing law of the case and collateral estoppel); *see also Huguley v. Gen. Motors Corp.*, 999 F. 2d 142, 145 (6th Cir. 1993) ("The relitigation exception is grounded in principles of res judicate and collateral estoppel.").[4] Because the Court of Appeals affirmed this Court's determination of the "mutuality" question, *Doctor's Assocs., Inc.*, 66 F. 3d at 458, the "relitigation" exception authorizes an injunction of state court proceedings on this issue.

Unlike the "necessary in aid of" exception, therefore, the "relitigation" exception is not a basis for enjoining state litigation of *all* of the issues involved in this matter. Nevertheless, the "relitigation" exception does offer further indication that a critical aspect of the requested injunction is permissible.

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[4] The principle of estoppel is further illustrated by *In re Necchi Sewing Machine Corporation*, 260 F. Supp. 665 (S.D.N.Y. 1966). In Necchi, the district Court enjoined state Court proceedings to "'protect' and 'effectuate'" its determination that the disputed issues were referable to arbitration. *Id.* at 669.

II. CONCLUSION

For the reasons stated, injunctive relief is proper and is not barred by the Anti-Injunctive Act. Accordingly, plaintiff's motion for preliminary injunction (doc. 164-1) is granted. Defendants, their agents, representatives, attorneys, and any one acting on their behalf are hereby enjoined, until further order of this Court, from commencing, prosecuting, or in any way acting in (1) any action related to or arising under any franchise agreement with Plaintiff and/or (2) any matter or dispute which is or may be subject to any arbitration clause in any such agreement. For reasons articulated in previous decisions, Plaintiff will not be required to post a bond.

SO ORDERED.

Dated at New Haven, Connecticut, January 2, 1996.

S/Peter C. Dorsey
Chief United States
District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DOCTOR'S ASSOCIATES, INC.,	:	Civil No. 3:94CV00349PCD
Plaintiff,	:	(Consolidated Actions)
v.	:	
EMILY DISTAJO, ET AL.,	:	Filed Feb. 14, 1996
Defendants.	:	

RULING ON MOTION TO FOREGO TRIAL AND GRANT JUDGMENT AS A MATTER OF LAW

Plaintiff Doctor's Associates, Inc. ("DAI") is the national franchisor of Subway sandwich shops, and defendants are Subway franchisees. The parties entered into standard franchise agreements, which required arbitration of all contractual disputes in Bridgeport, Connecticut, under Connecticut law. When contractual disputes did arise, the franchisees sought judgments against DAI in numerous state courts around the country. DAI has petitioned this court to compel arbitration of the franchise disputes pursuant to section 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4. The franchisees have opposed the petition on grounds including fraudulent inducement and waiver of the right to arbitration, which issues were remanded by the Second Circuit for determination by this court. *See Doctor's Assocs., Inc. v. Distajo*, 66 F. 3d 438, 458 (2d Cir. 1995). A trial on the franchisees' arbitration defenses is scheduled to begin on February 20, 1996.

I. DISCUSSION

1. Treating Petition to Compel Arbitration as Motion for Summary Judgment

DAI moves for the Court to forego trial and render judgment as a matter of law. In support of this request, DAI relies principally on two Second Circuit cases construing FAA § 4: *Manning v. Energy Conversion Devices, Inc.*, 833 F. 2d 1096 (2d Cir. 1987), and *Oppenheimer & Company, Inc. v. Neidhardt*, 56 F. 3d 352 (2d Cir. 1995). In *Manning*, the Second Circuit affirmed a district court's order compelling arbitration and held that there was no need for an evidentiary hearing on a fraudulent inducement defense when no affidavits had been offered in support thereof. 833 F. 2d at 1103. "A party resisting arbitration...must submit sufficient evidentiary facts in support of [its] claim in order to precipitate the trial contemplated by 9 U.S.C. § 4." *Id.* Moreover, "[a]rbitration is intended to be a process for the swift resolution of disputes, and parties endeavoring to resist arbitration must alert district courts promptly and fully to whatever claims they may have in opposition to arbitration and the evidentiary basis of such claims." *Id.*

In *Oppenheimer*, the Second Circuit affirmed a district court's order compelling arbitration and held that trial was unnecessary when no evidence had been offered in support of defendants' objection to arbitration. 56 F. 3d at 357-58. "If the party seeking arbitration has substantiated the entitlement by a showing of evidentiary facts, the party opposing may not rest on a denial but must submit evidentiary facts showing that there is a dispute of fact to be tried." *Id.* at 358.

Manning and *Oppenheimer* suggest that § 4 petitions to compel arbitration should be treated as motions for summary judgment. Such a procedure is

also suggested by decisions from other jurisdictions which have explicitly applied summary judgment principles to § 4 petitions. *See Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F. 2d 51, 54 n.9 (3d Cir. 1980); *Matterhorn, Inc. v. NCR Corp.*, 727 F. 2d 629, 632 (7th Cir. 1984). Accordingly, DAI's petition will be treated as a motion for summary judgment on the issues that remain to be adjudicated: the franchisees' defenses of waiver and fraudulent inducement, and the demand for abstention as to Raymond and Sandra Bickel.

2. Waiver of Right to Arbitration

The franchisees argue that DAI has waived its right to arbitration by pursuing eviction lawsuits against them through alter ego leasing companies. The Second Circuit has noted that the franchisees' waiver defense requires this Court to determine three issues. *See Doctor's Assocs., Inc.*, 66 F. 3d at 456-57. The first two issues do not require trial because they are not in dispute: DAI has conceded that the leasing companies were its alter egos and that the eviction proceedings were based on the cross-default provisions of the franchisees' subleases. *See Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F. 2d 1191, 1196 (7th Cir. 1987). ("If the arbitrability of the parties' dispute involves no questions or only legal questions, a jury trial would be pointless because its outcome could not affect the judge's decision on whether to order arbitration."). The third issue -- whether the franchisees suffered prejudice from the eviction actions also does not seem to involve any material factual disputes. *See, e.g., Cotton v. Slone*, 4 F. 3d 176, 179 (2d Cir. 1993) ("Sufficient prejudice to infer waiver has been found when a party seeking to compel arbitration engages in discovery procedures not available in arbitration, makes motions going to the merits of an adversary's claims, or delays invoking arbitration rights

while the adversary incurs unnecessary delay or expense.") (citations omitted). Nevertheless, the Court will not decide this issue as a matter of law until the parties have briefed it according to the schedule specified below.

3. Fraudulent Inducement

The franchisees argue that the franchise agreements were fraudulently induced because: (1) DAI misrepresented that arbitration is a condition precedent to litigation of franchise disputes, and (2) DAI failed to disclose that it regularly pursues eviction lawsuits through the alter ego leasing companies without first engaging in arbitration. The franchisees have not produced sufficient evidence to avoid summary judgment on the issue of fraudulent inducement. The only evidence suggesting that the alleged misrepresentation and nondisclosure actually occurred is contained in the February 12, 1996 affidavit of the franchisees' attorney, David M. Duree. (*See* Duree Aff. 4.) Duree's recitation of what DAI did and did not say in discussions with the franchisees would be inadmissible at trial as hearsay. *See* FED. R. EVID. 802. Inadmissible evidence may not be considered in connection with a motion for summary judgment. *See, e.g., Fowler v. Smith,* 68 F. 3d 124, 126 (5th Cir. 1995). Accordingly, DAI is entitled to judgment, as a matter of law, on the franchisees' defense of fraudulent inducement.

4. Abstention as to Raymond and Sandra Bickel

The franchisees Raymond and Sandra Bickel argue that this Court should abstain from exercising jurisdiction over DAI's claims against them in light of a related decision in Illinois state court. *See Bickel v. Subway Sandwich Shops, Inc.,* No. 94-L-1428, slip op. at 2 (Cir. Ct., 3d J. Cir., Madison County, Ill. Dec. 5,

1995). This issue does not appear to involve any material factual disputes. Nevertheless, the Court will not decide this issue as a matter of law until the parties have briefed it according to the schedule specified below.

5. Franchisees' Right to Jury Trial

The franchisees argue that judgment as a matter of law deprives them of their right to jury trial. This claim is without merit. It is well-established that absent genuine issues of material fact, summary judgment decides only questions of law and does not deny the losing party's right to jury trial. *See, e.g., Benjamin v. Traffic Executive Ass'n E. R.R.*, 869 F. 2d 107, 115 n.11 (2d Cir. 1989).

II. CONCLUSION

DAI's motion to forego trial and render judgment as a matter of law (docs. 181-1, 181-2) is granted. The trial schedule to begin on February 20, 1996 is canceled. DAI is granted judgment, as a matter of law, on the franchisees' defense of fraudulent inducement. The Court will decide the remaining issues as a matter of law after the parties brief the aforementioned issues of prejudice and abstention. The franchisees shall file a memorandum of law addressing these issues on or before February 21, 1996, and DAI shall file a memorandum in response on or before February 28, 1996.

SO ORDERED.

Dated at New Haven, Connecticut, February 14, 1996.

S/Peter C. Dorsey
Chief United States
District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

DOCTOR'S ASSOCIATES, INC.,	:	
	:	Civil No.
Plaintiff,	:	3:94CV00349PCD
	:	
v.	:	(Consolidated Actions)
EMILY DISTAJO, ET AL.,	:	
	:	Filed
Defendants.	:	March 14, 1996

RULING ON DEFENDANTS' MOTION TO SET ASIDE FEBRUARY 14, 1996 ORDER AND SCHEDULE TRIAL

Plaintiff Doctor's Associates, Inc. ("DAI") is the national franchisor of Subway sandwich shops, and defendants are Subway franchisees. The parties entered into standard franchise agreements, which required arbitration of all contractual disputes in Bridgeport, Connecticut. When contractual disputes did arise, the franchisees sought judgments against DAI in numerous state courts around the country.

DAI has petitioned this Court to compel arbitration of the franchise disputes pursuant to section 4 of the Federal Arbitration Act, 9 U.S.C. § 4. As defenses to arbitration, the franchisees have argued that DAI fraudulently induced their agreement to arbitrate and waived its right to arbitration. These issues were remanded by the Second Circuit for determination by this Court. *See Doctor's Assocs., Inc. v. Distajo*, 66 F. 3d 438, 458 (2d Cir. 1995).

After the franchisees demanded a jury trial, and trial was scheduled to begin on February 20, 1996, DAI sought to forego trial and obtain judgment as a matter of law. On February 14, 1996, DAI's motion was granted: trial was canceled, DAI was granted judgment as a matter of law on the issue of fraud, and the Court agreed to decide the remaining issues, as a matter of law, after further briefing. The franchisees move to set aside that ruling and reschedule trial.

I. DISCUSSION

A. Reconsideration of the Franchisees' Demand for a Jury Trial

As suggested in the February 14 ruling, the franchisees cannot force a jury trial simply by demanding one.[1] "A party resisting arbitration...must submit sufficient evidentiary facts in support of [his] claim to precipitate the trial contemplated by 9 U.S.C. § 4." *Manning v. Energy Conversion Devices, Inc.*, 833 F. 2d 1096, 1103 (2d Cir. 1987). He must show that, if proven, his allegations would relieve any obligation to arbitrate, and he must produce some evidence to substantiate his factual allegations. *Dillard v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 961 F. 2d 1148, 1154 (5th Cir. 1992), *cert. denied sub nom. Dillard v. Sec. Pac. Corp.*, 506 U.S. 1079 (1993). Furthermore, he must do so "promptly." *Manning*, 833 F. 2d at 1103.

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[1] Defendants have blithely assumed that their jury demand was sufficient by itself, although they should have known otherwise from a related state court decision. *See Suslovic v. Subway Real Estate Corporation*, No. 1768 of 1993, slip op. At 3 (Ct. Of Common Pleas, Beaver County, Pa Jan. 17, 1996) ("Plaintiffs have made no averments of fact to support the conclusory allegation of fraud. . .The trial Court is under no obligation to schedule a hearing in order to permit plaintiffs to prove that which they have not alleged.") (citation omitted).

Until affidavits were filed in recent weeks, the franchisees offered no substantiation of their fraud and waiver claims. They insist that they were not afforded sufficient time to come forward with evidence, on the ground that DAI's motion for judgment as a matter of law was not served at least ten days before trial, as was required given that the February 14 ruling treated DAI's motion as one for summary judgment. *See* FED. R. CIV. P. 56(c). In fact, the February 14 ruling conferred Rule 56 status not on DAI's motion to forego trial, but on DAI's petitions to compel arbitration. These were served between approximately March 8, 1994 and September 8, 1995, allowing each franchisee anywhere from five to twenty-three months to come forward with evidence before the eventual trial date. The franchisees' failure to do so until the very end of this protracted period clearly undermines their demand for a jury trial, as the Second Circuit has apparently regarded a delay of even a few weeks to be too great. *See Manning*, 833 F. 2d at 1103.

B. The Franchisees' Affidavits

Although belated, the franchisees' affidavits will be considered in relation to their defenses, along with the parties' compliance with the January 24, 1996 Trial Preparation Order. Affidavits of the following franchisees have been offered: Michael Johnson, Emily Distajo, Jose Brenes, Alvaro Guerrero, Sandra Bickel, Linda (Youmaran) Boudaghian, Louis Loenneke, Julie Shino, Gregory Kane, John Papaleo, Michael Kanchwala, Donald A. Stuart, Ronald Rothmund, and Bruno Giannini.

The affidavits are essentially identical, distinguished only by limited details of personal dealings with DAI or its affiliates. Each affidavit recites the following:

a. Before signing the franchise agreement, the franchisee was provided an offering circular;

b. The franchisee signed a form franchise agreement with DAI;

c. The franchise agreement provided that all disputes between DAI and the franchisee were to be arbitrated;

d. The franchise agreement stated that arbitration was a condition precedent to litigation by any party;

e. The representation in d) was false;

f. The falsity, per e), was not known by the franchisee when the franchise agreement was signed but is known now;

g. The franchisee did not know that lessors of the franchisee's business premises were alter egos of DAI or that they routinely initiated eviction lawsuits to resolve claims under the franchise agreement;

h. If g) had been known, the franchisee would not have signed the franchise agreement;

i. The franchisee relied on c) and d);

j. When signing the franchise agreement, the franchisee was not aware that the leasing companies had no assets, employees, income, or offices. Had this been known, the franchise agreement would not have been signed; and

k. DAI used eviction, actual or threatened, as leverage to force correction of alleged franchise agreement defaults.

Some franchisees also assert that:

a. Charges related to evictions were deducted from franchisees' deposit accounts;

b. Complaints to DAI about eviction and franchise agreement enforcement went unanswered

c. Some stores were sold/lost in the face of eviction;

d. Suits resulted from agreements to sell that were reached in the face of eviction; and/or

e. One franchisee was evicted by the landowner at DAI's instance.

C. *The Offering Circular and Franchise and Lease Agreements*

The franchise agreement and/or offering circular provide:

a. The franchisee acknowledges receipt of the offering circular ten days in advance of signing the franchise agreement;

b. "Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by Arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association...The commencement of arbitration proceedings to settle disputes arising out of or relating to this contract is a condition precedent to the commencement of a legal action by either party...."; and

c. "Other than the representation contained in this Agreement and advertising materials of the Franchisor, no other representations have been made to or relied on by the Franchisee...."

Each franchisee, in addition to executing a franchise agreement, executed a lease for the property in which the store was to be operated. The lessor was a leasing company associated with DAI. The offering circular notes the prospect of another corporation being the lessor and includes a sample sublease which flags the right of a lessor to seek eviction in the event of non-compliance with the franchise agreement or with the lease. There are no arbitration clauses in the leases.

The franchisees have not asserted that any information was provided by DAI, or anyone acting on its behalf, on which any franchisee relied in agreeing to the arbitration clause, other than the franchise agreement and the offering circular. There is no evidence that DAI concealed any material fact or refused any request by any franchisee for information about either the franchise agreement or the lease.

D. The Franchisees' Defenses

1. Fraud

The franchisees argue that they were induced to agree to arbitration by fraud on the part of DAI. "[I]f the 'arbitration clause was induced by fraud, there can be no arbitration....'" *Distajo,* 66 F. 3d at 457. Under Connecticut law,[2] the elements of fraud are "(1) that a false representation was made as a statement of fact; (2) that it was untrue and known to be untrue by the party making it; (3) that it was made to induce the other party to act on it; and (4) that the latter did so act on it to his injury." *Miller v. Appleby,* 183 Conn. 51, 54-55, 438 A. 2d 811, 813 (1981). "Fraud is not to be presumed but must be proven by clear and satisfactory evidence." *Id.* at 55, 438 A. 2d at 813. The issue is not

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[2] Most franchise agreements designate Connecticut law as controlling. Some cite Florida or Illinois law. DAI claims, without contradiction, that Florida and Illinois law does not differ.

whether DAI acted improperly in failing to arbitrate before resorting to litigation. If DAI failed to take steps required to resolve disputes with franchisees, there are remedies by which they may enforce their rights and DAI's obligations. To prevail on their defense, the franchisees must present evidence from which it could be found that they were induced by fraud to agree to arbitration.

The evidence is that the franchisees received the offering circular describing the transaction and the documents which accomplished it, the franchise agreement and the lease. For the ten days required by 16 C.F.R. § 436.1 *et seq.*, they had the opportunity to review the franchise agreement and consult with whomever they wished. They signed the franchise agreement and the lease with no evidence they were under any stress in doing so. They do not claim to have asked questions which were not answered. There is no claim of a representation other than what the franchise and the lease provided. The franchisees claim the representation that arbitration was a condition precedent to litigation was false and thus fraudulent. Arbitration is so stated as a provision of the franchise agreement. It is stated not as a fact but as a requirement of the franchise agreement. Even if it is regarded as an undertaking by DAI, it has not been shown to be false. There is no evidence that DAI had any intention, at the time of execution of the franchise agreements, to act in enforcement of its rights and the franchisees' obligations, other than in conformity with the lawful remedies available to it under the law.

At most, the evidence might show that the franchisees did not understand, or more likely did not consider, the possibility when the franchise agreement was signed, that franchise agreement duties might be enforced by eviction proceedings undertaken pursuant to the leases providing: "[i]f...Sublessee shall default in

the performance of any of the terms, covenants or conditions of the aforesaid Franchise Agreement...Sublessor, at its option, may terminate this lease on ten (10) days written notice to Sublessee, and upon such termination, Sublessee shall quit and surrender the leased premises...." Clearly compliance with the franchise agreement was interrelated with the entitlement to continued occupancy of the subleasehold. That evidence is insufficient to sustain the franchisees' claim. At most, they lacked understanding of the ramifications of two documents which they had ample opportunity to read and understand. In signing them, they are presumed to have read what was available to be read. They cannot hold DAI as misrepresenting what is plainly stated in the documents nor the legal ramifications thereof. If they did not understand what the documents plainly provide, their lack of understanding could not have resulted from misrepresentation, concealment, or misleading on the part of DAI. If the franchisees truly did not understand that eviction as provided by the lease could be used to enforce franchise agreement obligations, that lack of understanding could only have been the result of their failure to read the leases and franchise agreements, their failure to think through and thus consider DAI's possible courses of action to enforce the franchise agreements or their failure to consult and seek clarification of anything they did not understand. No omission or conduct of DAI is claimed or shown to have caused the franchisees' lack of knowledge.

It cannot be found that the franchisees' have offered evidence from which it could be found that they were fraudulently induced by DAI to agree to the arbitration clause. The clause which described arbitration as a condition precedent to litigation is not, as a matter of law, a misrepresentation. Defendants thus make an argument without factual substantiation. There is no

reason why they did not know, when they executed the franchise agreement, with the arbitration clause, what they claim to know now. Nor is there any reason why they could not have known then what they claim to know. What was in the lease and the franchise agreement was plainly available for them to have read and understood or to have been clarified had they wished. DAI neither precluded them from reading what was in each document nor comprehending what is plainly there stated. One cannot fail "to inquire about the ramifications of [an arbitration] clause to avoid the obvious consequences of an agreed-to arbitration." *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F. 2d 334, 339 (7th Cir. 1984). The franchisees cannot claim that DAI failed to explain an ambiguous contract because there is no ambiguity. Absent ambiguity, there can be no liability for failure to explain the meaning of a contract. *See Rush v. Oppenheimer & Co., Inc.*, 681 F. Supp. 1045, 1053-55 (S.D.N.Y. 1988); *Bender v. Smith, Barney, Harris Upham & Co., Inc.*, 789 F. Supp. 155, 158-59 (D.N.J. 1992).

After consideration of what the franchisees have now made part of the record, it is found that they have not offered evidence from which it could be found that there was a misrepresentation, know by DAI to be false, which was made to induce them to agree to arbitration. Accordingly, the franchisees' defense of fraud does not present a triable issue.

2. Waiver

The elements of waiver are that an eviction was initiated by DAI based on a franchise agreement default and its cross-default provision and that prejudice was caused to a franchisee in relation to the claim now in litigation. *See Distajo*, 66 F. 3d at 457. DAI concedes responsibility for the eviction, resolving the alter ego and control questions. Doubt as to defenses to

arbitration, such as waiver, are to be resolved in favor of arbitration. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S.1, 24-25 (1983). This is consistent with promotion of arbitration as the parties' chosen method of resolving disputes. *See Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F. 3d 20, 25 (2nd Cir. 1995). Arbitration's favored status creates a presumption against waiver. *Kramer v. Hammond*, 943 F. 2d 176, 179 (2d Cir. 1991); *Lawrence v. Comprehensive Business Servs.*, 833 F. 2d 1159, 1165 (5th Cir. 1987).

a. Franchisees Who Were Not Subject to Eviction Proceedings

The following franchisees have not been subject to any eviction action and therefore cannot claim waiver: Raymond and Sandra Bickel, Michael Johnson, Gregory Kane, Louis Loenneke and Mary Ann Bookout, Julie and Johnson Shino, and Leylah and Albert Yonan.

Kane makes no allegation of eviction by DAI. He asserts an eviction by his "Landlord" unrelated to DAI. He claims the landlord was requested to do so by DAI with no reflection of any foundation for the claim - - i.e., the source of his assertion. His claim of a defense fails for two reasons. The eviction is not shown to have been based on a default under a franchise agreement, and could not be where brought by an unrelated landlord under a lease which is not shown to have a cross-default clause with the franchisee. Secondly, the eviction was not done by an alter ego under DAI control and thus could not have prejudiced Kane as the issues there litigated are not shown to have any relation to the issues between Kane and DAI. There is no substantiation for his claim of waiver.

Johnson, Loenneke, and Julie Shino allege not eviction, but only threats of eviction which forced them to make payments of amounts owed. Shino claims

threats to collect eviction fees which are not shown to be franchise agreement obligations. Payments made under threat of eviction are not a basis for waiver absent an eviction, the prosecution of which constitutes "litigation of substantial issues going to the merits." *Sweater Bee by Bariff, Ltd, v. Manhattan Indus., Inc.*, 754 F. 2d 457, 461 (2d Cir. 1985), *cert. denied*, 474 U.S. 819 (1985). Thus there is no evidence that "DAI did litigate substantial issues going to the merits" and that "the franchisees suffered prejudice from the eviction proceedings." *Doctor's Assocs.*, 66 F. 3d at 457. These franchisees cannot have been forced to litigate issues in eviction proceedings when there were no such proceedings. They were not prejudiced thereby. Johnson, Kane, Loenneke and Bookout, Yonan and the Bickels and Shinos have not offered evidence from which it could be found that their defense of waiver is valid and thus no issue is presented for determination by a trier of fact.

b. Franchisees Who Were Subject to Eviction Proceedings

i. Background

Alvaro and Maria Guerrero. In the summer of 1992, an eviction was brought and dismissed against the Guerreros after they reached "an agreement with respect to the claimed unpaid royalties" and fees. In July 1993, another eviction action was brought for the same royalties and fees. The Guerreros made no claim for arbitration. The action was dismissed as the sublessor was not registered to do business in the state. There was no adjudication of the merits. There is no claim by the Guerreros that royalties or fees were not owed to DAI.

Wesam and Linda Youmaran. An eviction was commenced against the Youmarans, who did not seek arbitration of the claimed royalties and fees. A

judgment of possession and indebtedness entered. The Youmarans paid and were permitted to retain possession and sell the franchise. They have not claimed that royalties or fees were not owed to DAI.

Emily and Renato Distajo, and Constantino and Milo Lamando. An eviction was brought against the Distajos and Lamandos, who were co-franchisees. Unpaid royalties and fees were alleged. They made no claim for arbitration. The case was dismissed in three weeks for want of registration by the sublessor in the state. There was no adjudication of the substantive claims. These franchisees do not claim there that royalties or fees were not owed to DAI.

John Papaleo. An eviction action was commenced against Papaleo, who did not dispute unpaid royalties and advertising fees under the franchise agreement. He claimed that he was unable to pay them. He abandoned the store and the franchise, whereupon the eviction was dismissed. No adjudication of the disputes occurred. Arbitration was not claimed.

Jose Brenes. Evictions were initiated against Jose Brenes who operated two locations. Fees under the franchise agreements were claimed. Arbitration was not claimed by Brenes. While the first eviction was pending, the lease was not renewed by the sublessor. Brenes was required to pay the rent due under the lease. Thus the sublessor was not required to preserve the property for him. That location was lost. There is no evidence of an adjudication of the substantive claims pertaining to that location. At the second location, eviction was ordered but before it was executed Brenes surrendered the property.

Ronald and Patricia Rothmund. An eviction was brought against the Rothmunds based on unpaid royalties and fees under the franchise agreement for which judgment was entered. The Rothmunds have not

disputed unpaid amounts due. They were "unaware of the eviction lawsuit or the judgment against [sic] that time." DAI refused to negotiate the payment offered toward the amount claimed, and the store was padlocked.

Michael and Anver Kanchwala, and Azim Hemani. The eviction action against the Kanchwalas and Hemani is claimed by DAI to have been based solely on unpaid rent. It supports its contention by an affidavit, its letter to the franchisees of January 6, 1995, and the complaint in the eviction action. Michael Kanchwala concedes that the eviction claimed unpaid rent under the sublease but adds that attorneys' fees were claimed under the franchise agreement. By Kanchwala's own affidavit, however, the eviction action was brought by a leasing company which was not a party to the franchise agreement. It was impossible, therefore, for the Court to award fees based thereupon. Thus, Kanchwala's assertion that attorneys' fees were claimed under the franchise agreement cannot be credited and will not be deemed to create an issue for a trier of fact.

Bruno Giannini. An eviction action was brought against Giannini, who did not seek arbitration and did not dispute the amount alleged to be owed. He asserts he had difficulty paying royalties on time. The action was dismissed as the sublessor was not registered to do business in the state. No substantive disputes were adjudicated.

ii. Discussion

The substantive disputes between these franchisees and DAI are twofold. The first group of disputes arise from the franchise agreement in the form of royalties and fees that defendants do not dispute are provided for in the franchise agreement. There is no evidence from which it could be found that these were improper bases

for the eviction actions, nor is it claimed that no amount had accrued to DAI's credit.

The second group of disputes are defendants' complaints of DAI's conduct in bringing about the franchise agreements and in dealing with franchisees in relation to the operation of the franchises. These were asserted in the state Court claims which prompted DAI's petitions to compel arbitration.

Only if the eviction actions claimed noncompliance with the franchise agreements and prejudiced the franchisees by forcing litigation of arbitrable claims will waiver will lie as a defense to arbitration. Litigation involving claims that were not arbitrable does not constitute waiver of the right to arbitration. *Lawrence*, 833 F. 2d at 1165. "Waiver will be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party." *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F. 2d 494, 496 (5th Cir. 1986). As to franchisees subjected to eviction actions, it must be considered whether DAI delayed requesting arbitration of the claims presented and that the eviction proceedings prejudiced the franchisees' claims. *See Ank Shipping Co. of Greece v. Seychelles Nat'l Commodity Co., Ltd.*, 596 F. Supp. 1455, 1458 (S.D.N.Y. 1984).

The eviction action against the franchisees Kanchwala and Hemani was not based on any claim arising under the franchise agreement. Their claim of waiver cannot be found to be substantiated by any evidence.

The eviction actions against the franchisees Distajo, Yonan, and Giannini were dismissed as their sublessor was not registered in the state and thus could not maintain the action. No substantive claims were adjudicated therein and the franchisees were not prejudiced. "[F]iling of an action[] is not a waiver of the

right to arbitrate, at least not before the defendant has answered on the merits...." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Lecopulos,* 553 F. 2d 842, 845 (2d Cir. 1977). Their claim of waiver is not substantiated.

The first eviction action against Guerrero was settled and dismissed. The second action was dismissed as the sublessor was not registered in the state and could not maintain the action. For the same reasons noted with respect to Distajo, Yonan, and Giannini, Guerrero cannot be found to have sustained his claim of waiver.

The eviction action against Papaleo was dismissed after he abandoned the store. There is no evidence to suggest that the process was substantial or that any adjudication of his rights actually occurred. As he walked away from the premises, and the franchise, there appears to be no evidence of prejudice and his claim of waiver thus could not be found to be sustained.

The eviction action against the Youmarans resulted in a judgment but they settled the claim of unpaid royalties and fees, retained the location, and subsequently sold the business. That evidence would not suggest they suffered any prejudice with respect to the claims involved in their claims against DAI and thus would not sustain their claim of waiver.

The Rothmunds had no knowledge of the action until they were notified they were about to be locked out. They were evicted.

The first premises subleased to Brenes were lost when the sublessor, who claimed nonpayment of rent, did not renew the lease. The record clearly reflects that Brenes was obliged for the rent under the lease. The eviction pertaining to that property is not shown to have prejudiced him as the loss of the property, and his

rights under the sublease, were not the responsibility of DAI or his sublessor. The eviction pertaining to his second location did result in a Court order ousting him of possession. That was accomplished by his surrender of the property. The eviction actions, and in particular those against Brenes and the Rothmunds, asserted amounts due under the franchise agreements and the leases. None of the proceedings are suggested to have been extensive, nor have the results been suggested as in any way impairing the claims the franchisees asserted in their state court actions concerning which DAI has requested arbitration. What the franchisees have claimed in those actions they are fully able to present in arbitration or in court, whichever forum they are found entitled to. There has been no delay to the franchisees with respect to the claims asserted in state court other than the delay in their efforts to avoid arbitration. DAI, promptly after each state court action was commenced, petitioned for an order compelling arbitration. The eviction actions claimed remedies on the basis of defaults by the franchisees in obligations allegedly created by the franchise agreements and/or subleases. The franchisees have not disputed the obligations or the defaults except some disputes as to the amounts accrued. What they have challenged is the propriety of DAI and the sublessors reserving the right to those remedies and procedures in the franchise agreements and subleases and the propriety of the conduct of the sublessors, DAI, and DAI's associates other than the sublessors (who were not involved in the eviction actions). In short, the disputes involved in the eviction actions are not the same as the disputes involved in the franchisees' state court actions which DAI has sought to resolve in arbitration.

The franchisees note expense incurred in the eviction cases, of limited magnitude, *see Distajo,* 66 F. 3d at 4557, but suggest no identity of the issues in those

cases, even those in which judgments entered, and the issues in the matters DAI seeks to arbitrate. The cases are clear, and *Distajo* confirms, to have waived the right to arbitration. The party seeking arbitration must substantially invoke the judicial process to resolve the issues claimed for arbitration. In *Distajo,* Judge Cabranes cites *Cotton v. Slone*, 4 F. 3d 176 (2d Cir. 1993), and *Com-Tech Associates v. Computer Associates International, Inc.*, 938 F. 2d 1574 (2d Cir. 1991), in which prejudice was found where the party seeking arbitration "fully litigated *arbitrable* issues on the merits" or "forced plaintiffs to litigate *arbitrable* claims, and caused considerable expense and delay" with respect to the precise issues sought to be placed in arbitration. *Distajo*, 66 F. 3d at 447 (emphasis added). That is not the case here. *See Gingiss Int'l, Inc. v. Bormet,* 58 F. 3d 328, 332 (7th Cir. 1995) (no waiver in bringing an eviction action on a separate sublease "because that action involved different issues" than those being arbitrated); *McMahon v. Shearson/Am. Express, Inc.*, 618 F. Supp. 384, 387 (S.D.N.Y. 1985), *aff'd in part and rev'd on other grounds,* 788 F. 2d 94 (2d Cir. 1986), *rev'd on other grounds,* 482 U.S. 220 (1987).

The franchisees never sought to arbitrate the claims now at issue, consistent with their vigorous efforts in these actions to avoid arbitration. Their claims of prejudice are less telling when the only delay in obtaining a determination of the disputes is not the result of the eviction actions but of the attempts here to avoid arbitration. The issues that the franchisees asserted in state court were not raised in any of the eviction actions. When they were raised in state court, DAI immediately petitioned for orders to compel their arbitration. The franchisees argue that threats of use of eviction, and charges of franchisees' accounts with eviction-related activities, qualify as grounds for

finding prejudice. They cite no authority for the proposition, and the argument flies in the face of the cases discussed above, which clearly base waiver on substantial resort to the courts to litigate arbitrable disputes. Threats are not a basis for finding waiver. *Romnes v. Bache & Co.*, 439 F. Supp. 833, 839 (W.D. Wis. 1977). The franchisees assert prejudice but offer no analysis or demonstration of how prejudice occurred. Each eviction action but one was concluded prior to commencement of each franchisee's state court action. The Distajo eviction was dismissed several days after the state court action was commenced. A concluded eviction action could hardly have delayed or prejudiced a defendant who later sought to litigate different issues.

3. Abstention

The franchisees Raymond and Sandra Bickel argue that this Court should abstain from compelling them to arbitrate because of a related, December 6, 1995 judgment in their favor in Illinois state court. This Court's February 14 ruling noted that the Bickels have not objected to this conclusion.

The Bickels' abstention claim is just a slightly modified version of the res judicata/collateral estoppel argument that this Court and the Second Circuit have previously rejected. *See Distajo,* 66 F. 3d at 449-50. When disposing of the earlier defense, the Second Circuit noted that an Illinois judgment is not entitled to preclusive effect until the "the potential for appellate review [has] been exhausted." *Id.* (quoting *Ballweg v. City of Springfield,* 114 Ill. 2d 107, 113, 499 N.E. 2d 1373, 1375, 102 Ill. Dec. 360, 362 (1986)). Illinois law has not changed in the interim, and DAI's appeal of the Bickels' judgment is still pending. Accordingly, there is no basis for preclusion.

A different outcome is not warranted by the Bickels' reliance on *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation,* 460 U.S. 1 (1983). That case counsels abstention when relatively substantial proceedings have taken place in state court. *Id.* at 22. DAI asserts, without contradiction, that the Illinois judgment was entered almost immediately and without an evidentiary hearing. Such action does not constitute relatively substantial proceedings, as meant by *Moses H. Cone,* when compared with the Second Circuit's *Distajo* ruling and this Court's plethora of decisions in these consolidated cases over the last two years.

II. CONCLUSION

For the foregoing reasons, the franchisees' motion (docs. 191-1, 191-2) is denied. The prior finding that the franchisees have not shown their entitlement to trial on the issue of fraud, and that a matter of law that defense is without merit, will stand. The franchisees have also not demonstrated the existence of a genuine issue of material fact as to their defense of waiver, which is found to be without merit as a matter of law. Further, it is found that there is no basis for abstention as to the Bickels.

Accordingly, DAI's petitions to compel arbitration are granted. The preliminary injunctions entered on November 28, 1995 and January 3, 1996 will remain in effect because they are necessary to effectuate the foregoing judgment compelling arbitration. *See, e.g., McGuire, Cornwell & Blakey v. Grider,* 765 F. Supp. 1048, 1052 (D. Colo. 1991).

The clerk shall close the file.

SO ORDERED.

Dated at New Haven, Connecticut, March 12, 1996.

S/Peter C. Dorsey
Chief United States
District Judge

QUESTIONS PRESENTED IN THIS AND TWO OTHER PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

QUESTIONS PRESENTED IN THE PETITION ARISING FROM THE FEBRUARY 24, 1997 JUDGMENT IN SECOND CIRCUIT DOCKET NO. 96-7321

I. Whether the abstention doctrine bars a federal court from enjoining further prosecution of a state case in which a judgment for $400,000.00 has been entered, an appeal bond posted and appeal filed, while ordering arbitration of the same claim previously determined by the state judgment?

II. Whether the Rooker-Feldman Doctrine denies subject matter jurisdiction to the lower federal courts to relitigate state judgments holding the arbitration clauses void and unenforceable and awarding $400,000.00 in damages if the federal actions were filed before the state judgments were entered?

III. Whether the Rooker-Feldman Doctrine denies subject matter jurisdiction to the lower federal courts to relitigate the issues and claims previously determined by the North Carolina state court which refused to enforce the arbitration clause, if the Connecticut federal action was filed after the state rulings and raised issues inextricably intertwined with the state rulings: i.e., the validity and enforceability of the arbitration clause?

QUESTIONS PRESENTED IN THE PETITION ARISING FROM THE FEBRUARY 24, 1997 JUDGMENT IN SECOND CIRCUIT

DOCKET NO. 96-7011

I. Whether a federal court may enjoin in personam proceedings in a state court which has concurrent jurisdiction over the same claim, to insure federal determination of that claim?

II. Whether the federal courts may avoid appellate scrutiny of a federal injunction of state proceedings, issued in violation of 28 U.S.C. §2283 to preserve the case for federal determination, by entering a subsequent judgment and another injunction to effectuate it, made possible by the earlier, offending injunction?

QUESTIONS PRESENTED IN THE PETITION ARISING FROM THE JUNE 10, 1997 JUDGMENT IN SECOND CIRCUIT

DOCKET NO. 96-9141

I. Whether state law or federal common law determines the waiver defense to enforceability of a contract to arbitrate?

II. If federal common law determines the waiver defense, whether prejudice to the non-waiving party is an element of the defense?